DOCKET

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v.
Sperry Corporation, et al.

Docketed:
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Court: United States Court of Appeals for the Federal Circuit

Counsel for appellant: Solicitor General

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Entry	Date	Note	Proceedings and Orders
1	Oct 28 1988	G	Application (A88-352) to extend the time to file a jurisdictional statement on appeal from November 7, 1988 to December 7, 1988, submitted to The Chief Justice.
2	Nov 1 1988		Application (A88-352) granted by the Chief Justice extending the time to file until December 7, 1988.
3	Dec 7 1988	G	Statement as to jurisdiction filed.
5	Jan 9 1989	X	Brief of appellees Sperry Corp., et al. in opposition filed.
4	Jan 11 1989		DISTRIBUTED. February 17, 1989
6	Feb 10 1989	X	Reply brief of appellant United States filed.
7	Feb 21 1989		PROBABLE JURISDICTION NOTED.
			**********
9	Mar 31 1989		Order extending time to file brief of appellant on the merits until April 28, 1989.
10	Apr 28 1989		Brief of appellant United States filed.
11	May 10 1989		Record filed.
		*	Certified copy of original record received.
12	May 12 1989		Record filed.
		*	Certified record received from U. S. Court of Claims. (3Folders).
13	May 19 1989		Joint appendix filed.
16	May 31 1989		Brief amicus curiae of Pacific Legal Foundation filed.
14	Jun 1 1989		Brief of appellees Sperry Corp., et al. filed.
15	Jun 1 1989		Brief amicus curiae of Chevron Corporation filed.
17	Jun 26 1989		Reply brief of appellant United States filed.
18	Jul 12 1989		CIRCULATED.
19	Jul 20 1989		SET FOR ARGUMENT TUESDAY, OCTOBER 10, 1989. (1ST CASE)
20	Oct 10 1989		ARGUED.

JURISDICTIONAL

STATEMENT

88-952

No.

Supreme Court, U.S.
FILED
DEC 7 1988
JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, APPELLANT

v.

SPERRY CORPORATION AND SPERRY WORLD TRADE, INC.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

The Federal Reserve Bank of New York has been designated to receive payment of awards by the Iran-United States Claims Tribunal in favor of United States nationals. Section 502 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, 99 Stat. 438, requires the Federal Reserve Bank of New York to deduct from any such award 1½% of the first $5 million and 1% of any amount in excess of $5 million, as reimbursement to the United States Government for expenses incurred in connection with the arbitration of claims of United States nationals against Iran and the maintenance of the Security Account out of which meritorious claims are paid. The question presented by this case is:

Whether Section 502 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, is unconstitutional on the ground that it effects a taking of the property of a successful United States claimant before the Tribunal, without payment of just compensation.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No.

UNITED STATES OF AMERICA, APPELLANT

v.

SPERRY CORPORATION AND SPERRY WORLD TRADE, INC.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 853 F.2d 904, and the opinion of the United States Claims Court (App., *infra*, 12a-25a) is reported at 12 Cl. Ct. 736. The prior oral ruling of the Claims Court (App., *infra*, 26a-51a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1988, and the notice of appeal (App., *infra*, 52a-53a) was filed on September 8, 1988. On November 1, 1988, the Chief Justice extended the time for docketing the appeal to and including December 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.[1]

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[1] Section 1252 was repealed by Section 1 of Public Law No. 100-352, 102 Stat. 662, which was enacted on June 27, 1988. However, Section 7 of Public Law 100-352 provides that the repeal of 28 U.S.C. 1252 "shall take effect ninety days after the date of the enactment of this Act" (*i.e.*, on September 25, 1988) and "shall not * * * affect the right to review or the manner of reviewing

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

2. Section 502 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, 99 Stat. 438, codified at 50 U.S.C.(Supp. III) 1701 note, provides:

> (a) DEDUCTION FOR EXPENSES OF THE UNITED STATES.—Except as provided in section 503, the Federal Reserve Bank of New York shall deduct from the aggregate amount awarded under each enumerated claim before the Iran-United States Claims Tribunal in favor of a United States claimant, an amount equal to 1½ percent of the first $5,000,000 and 1 percent of any amount over $5,000,000, as reimbursement to the United States Government for expenses incurred in connection with the arbitration of claims of United States claimants against Iran before that Tribunal and the maintenance of the Security Account established pursuant to the Declarations of the Democratic and Popular Republic of Algeria of January 19, 1981. The Federal Reserve Bank of New York shall make the deduction required by the preceding sentence whenever the Bank receives an amount from the Security Account in satisfaction of an award rendered by the Iran-United States Claims Tribunal on the enumerated claim involved.
>
> (b) DEDUCTION TREATED AS MISCELLANEOUS RECEIPT.—Amounts deducted by the Federal Reserve Bank of New York pursuant to subsection (a) shall

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the judgment or decree of a court which was entered before such effective date" (102 Stat. 664). In this case, the judgment of the court of appeals was entered on August 10, 1988, before the effective date of the repeal of 28 U.S.C. 1252, and a direct appeal therefore lies to this Court.

> be deposited into the Treasury of the United States to the credit of miscellaneous receipts.
>
> (c) PAYMENT TO UNITED STATES CLAIMANTS.—Nothing in this section shall be construed to affect the payment to United States claimants of amounts received by the Federal Reserve Bank of New York in respect of awards by the Iran-United States Claims Tribunal, after deduction of the amounts calculated in accordance with subsection (a).
>
> (d) EFFECTIVE DATE.—This section shall be effective as of June 7, 1982.

STATEMENT

1. a. Appellees are two corporations organized under the laws of Delaware. During the 1970s, they were parties to various contracts with the Government of Iran and its instrumentalities for the lease of computer systems and the performance of data processing services. In 1974, appellees established a branch office in Tehran, Iran, in order to facilitate the conduct of their business in that country. App., *infra*, 13a.

On November 4, 1979, "the American Embassy in Tehran was seized and our diplomatic personnel were captured and held hostage." *Dames & Moore* v. *Regan*, 453 U.S. 654, 662 (1981). Ten days later, in response to the taking of the hostages and a threat by Iran to withdraw its assets from the United States (see 15 Weekly Comp. Pres. Doc. 2117 (Nov. 14, 1979)), the President declared a national emergency pursuant to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. (1976 ed. (Supp. III 1979)) 1701-1706. The President also issued an Executive Order blocking the removal or transfer of "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States." Exec. Order No. 12170, 3 C.F.R. 457 (1980), 50 U.S.C. (1976 ed. Supp. III 1979) 1701 note. See *Dames & Moore*, 453 U.S. at 662-663.

On November 15, 1979, the Department of the Treasury issued implementing regulations declaring "null and void" any

attachment or judgment affecting Iranian property that was covered by the blocking order, unless the attachment or judgment was licensed by the Secretary of the Treasury. 31 C.F.R. 535.203(e) (1980). The regulations expressly provided that any such license could be amended, modified, or revoked at any time. 31 C.F.R. 535.805 (1980). On November 26, 1979, the Secretary granted a general license authorizing specific judicial proceedings against Iran. 31 C.F.R. 535.504(a) (1980). A clarifying regulation, issued approximately three weeks later, stated that this license authorized "prejudgment attachments," but not "the entry of any judgment or of any decree or order of similar or analogous effect." 31 C.F.R. 535.418, 535.504(b)(1) (1980). See *Dames & Moore*, 453 U.S. at 663.

Several months after the President blocked Iranian assets in the United States, appellees withdrew all of their non-Iranian personnel from Iran as a result of increasing hostility toward American business interests in that country.[2] In July 1980, appellees filed suit against Iran and a number of its instrumentalities in the United States District Court for the District of Columbia seeking a total of $18 million in damages for past-due computer rentals, conversion of assets that Iran allegedly had prevented appellees from removing from that country, and interference with business relationships. On October 24, 1980, appellees obtained a pre-judgment attachment of Iranian assets located in the United States. *Sperry Corp.* v. *Islamic Republic of Iran*, No. CA-80-1614 (D.D.C. Oct. 24, 1980).

b. After these events, the break in diplomatic relations between Iran and the United States, and the loss of American lives in a military operation to rescue the hostages, the United States and Iran entered into an agreement on January 19, 1981. The agreement took the form of the adherence by the two governments to two declarations of the government of Algeria,

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[2] See *Iran Claims Act: Hearing on H.R. 3241 Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 98th Cong., 1st Sess. 31-32 (1983) (testimony of David K. Anderson, General Counsel of Sperry Corporation Computer Systems) (*1983 Hearing*).

commonly referred to as the "Algiers Accords." See Declaration of the Government of the Democratic and Popular Republic of Algeria, and Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, *reprinted in* 19 Bureau of Public Affairs, U.S. Department of State, *Selected Papers* 2-5 (Mar. 12, 1981) (C.A. App. A19-A23).

In general terms, the Accords provided for the release of the American hostages and for the settlement of claims by the nationals of each party against the government of the other. As relevant here, the Accords stated that a "purpose of both parties" was "to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of such claims through binding arbitration" (C.A. App. A21). The United States therefore undertook "to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises," and "to nullify all attachments of and judgments obtained therein" (*ibid.*). *Dames & Moore*, 453 U.S. at 665.

The Accords further provided for the establishment at The Hague of an international arbitral tribunal, known as the Iran-United States Claims Tribunal, to hear and render "final and binding" decisions, enforceable in the courts of any nation under its laws, on contract, expropriation and certain other claims against the government of each country by nationals of the other (C.A. App. A22, A23). Any such claims had to be filed with the Tribunal within one year of the entry into force of the Accords or six months of the appointment of the President of the Tribunal, whichever was later (C.A. App. A23). The United States was required to bring about the transfer of all Iranian assets that were held by banks in this country and by United States banks abroad and that previously had been blocked by the President (C.A. App. A21-A22). Of those assets, $1 billion were to be placed in a "Security Account," for the purpose of securing the payment of, and paying, the claims of United States nationals against Iran; and Iran was required to

maintain a minimum balance of $500 million in the Security Account until all Tribunal awards against Iran had been paid (C.A. App. A21). See *Dames & Moore*, 453 U.S. at 664-665. The Accords required each government to designate an agent at The Hague to represent it to the Tribunal and to receive notices or other communications directed to it or its nationals (C.A. App. A23). Finally, the Accords provided that "[t]he expenses of the Tribunal shall be borne equally by the two governments" (*ibid.*).

President Carter issued a series of Executive Orders on January 19, 1981, to implement the Algiers Accords. Those Executive Orders revoked all licenses permitting the exercise of "any right, power, or privilege" with regard to Iranian assets; nullified all non-Iranian interests in such assets acquired after November 14, 1979; and directed persons holding blocked Iranian financial assets to transfer them to the Federal Reserve Bank of New York as fiscal agent of the United States, for disposition as directed by the Secretary of the Treasury. Exec. Order Nos. 12277-12281, 3 C.F.R 105-113 (1982), 50 U.S.C. 1701 note. On February 24, 1981, a little more than one month after his inauguration, President Reagan issued an Executive Order in which he "ratified" the Executive Orders issued by President Carter on January 19, 1981; "suspended" all "claims which may be presented to the * * * Tribunal"; and provided that such claims "shall have no legal effect in any action now pending in any court of the United States." Exec. Order No. 12294, 3 C.F.R. 139 (1982), 50 U.S.C. 1701 note. The Order provided that a claim would be discharged for all purposes when the Tribunal either awarded some recovery and that amount was paid, or the Tribunal determined that no recovery was due. *Ibid.*; *Dames & Moore*, 453 U.S. at 665-666.

c. This Court sustained the President's actions in *Dames & Moore*, which was decided in July 1981. The Court expressly held that the President's revocation of pre-judgment attachments granted pursuant to the Treasury license did not constitute a taking of property because those attachments were revocable and "in every sense subordinate to the President's

power under the IEEPA" (453 U.S. at 674 n.6). Following the Court's decision, more than $2 billion in Iranian assets held by banks in the United States were marshalled; $1 billion were deposited in the Security Account, and the remainder was transferred to Iran. Thereafter, appellees filed a claim against Iran with the Tribunal, seeking payment of past-due computer rentals and reimbursement for assets that Iran allegedly had not permitted appellees to remove from that country. App., *infra*, 3a, 14a.

2. The Federal Reserve Bank of New York is the fiscal agent of the United States in carrying out the Algiers Accords. Under this arrangement, awards made by the Tribunal in favor of United States claimants are paid from the Security Account to the Federal Reserve Bank, which then pays the award to the claimant. App., *infra*, 13a; 47 Fed. Reg. 25243 (1982). On June 7, 1982, before the Tribunal rendered any awards in favor of United States claimants, the Department of the Treasury issued a "directive license" requiring the Federal Reserve Bank to deduct two percent from each award it received from the Tribunal and to pay that amount into the Treasury "to reimburse the United States Government for costs incurred for the benefit of U.S. nationals who have claims against Iran." 47 Fed. Reg. 25243 (1982). The directive was issued pursuant to the Independent Offices Appropriations Act (IOAA), now codified at 31 U.S.C. 9701, which authorizes each federal agency to promulgate regulations establishing a fair charge for services provided by that agency, based on the costs to the government, the value of the services, and the public policy and interests to be served.[3]

3. On July 8, 1982, approximately one month after the Treasury Department issued the directive license, appellees and Iran entered into a settlement agreement and filed a request with the Tribunal for an "Award on Agreed Terms" to give effect to the settlement. On September 14, 1982, the Tribunal "accepted and recorded" the settlement, stating that it was "binding on

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[3] At the time the directive license was issued, the IOAA was codified at 31 U.S.C. (1976 ed.) 483a. The IOAA was redesignated as 31 U.S.C. 9701 as part of the recodification of Title 31 that was enacted by the Act of Sept. 13, 1982, Pub. L. No. 97-258, §1, 96 Stat. 1051.

both parties, and consequently [Iran] is obligated to pay [appellees] the sum of * * * [$2,800,000], which obligation shall be satisfied by payment out of the Security Account * * *."[4] When the Federal Reserve Bank of New York received payment of the Tribunal's award in favor of appellees, it deducted the two percent charge ($56,000), deposited that amount in the Treasury pursuant to the directive license, and paid the balance of $2,744,000 to appellees. App., *infra*, 3a, 14a.

4. On December 17, 1982, appellees filed this action in the United States Claims Court (C.A. App. A41-A54). Appellees contended, inter alia, that deduction of the two percent charge from its Tribunal award violated the IOAA and the Fifth Amendment of the United States Constitution. On May 1, 1985, the Claims Court rendered an oral decision concluding that the Treasury Department's directive license violated the IOAA (App., *infra*, 26a-51a) because it imposed a fee for services furnished not only by that Department, but also by the Departments of State and Justice (*id.* at 35a-37a), and because the administrative record did not sufficiently show the basis for the calculation of the government's expenses or the apportionment of those expenses to Tribunal awards (*id.* at 37a-47a).[5]

5. Congress reacted immediately to the Claims Court's oral decision. On August 16, 1985, before the Claims Court entered a final judgment, Congress enacted the Iran Claims Settlement Act as Title V of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, §§ 501-505, 99 Stat. 437-439, 50 U.S.C. (Supp. III) 1701 note. Section 502(a) of that Act requires the Federal Reserve Bank of New York to

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[4] Award on Agreed Terms, No. 10-205-2, Iran-United States Claims Tribunal (Sept. 14, 1982), amended in other respects (Sept. 22, 1982) (Pltf. Mot. for Sum. Jdgmt. Exh. 6, filed 12/23/83). Iran had indicated that it would file a counterclaim with the Tribunal seeking recovery of taxes from appellees, and that counterclaim was taken into account in the settlement. See *1983 Hearing* 32-33 (Anderson Testimony), note 2, *supra*.

[5] The Claims Court denied appellees' motion to certify a class (C.A. App. A55), and appellees did not appeal that ruling.

deduct from a Tribunal award "an amount equal to 1½ percent of the first $5,000,000 and 1 percent of any amount over $5,000,000, as reimbursement to the United States Government for expenses incurred in connection with the arbitration of claims of United States claimants against Iran before the Tribunal and the maintenance of the Security Account established pursuant to [the Algiers Accords]" (99 Stat. 438). The statutory requirement was made effective as of June 7, 1982 (§ 502(d), 99 Stat. 438), the date on which the Treasury Department had issued the directive license under the IOAA.

The legislative history shows that the United States incurred expenses for such items as the payment of one-half of the annual expenses of the Tribunal; management fees paid to the depository for the Security Account; expenses of the Federal Reserve Bank of New York in marshalling Iranian assets for transfer to the Security Account and distributing awards certified by the Tribunal; efforts by the Departments of Treasury and Justice to ensure compliance with the Algiers Accords; and the State Department's costs in maintaining offices here and abroad to facilitate the filing of claims, service of Tribunal documents, and presentation of positions on major issues of common importance to United States claimants. See *Claims Against Iran: Hearing Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. 14-17 (1982); *Iran Claims Legislation: Hearing Before the Senate Comm. on Foreign Relations*, 99th Cong., 1st Sess. 14-15, 26-32 (1985) (*1985 Hearing*). The legislative record further shows that the United States contributed $900,000 annually for the maintenance of the Security Account and $2 million annually for the operations of the Tribunal, and that the State Department and other agencies were spending approximately $1 million annually to provide assistance to United States claimants. *1985 Hearing* 14-15, 26.

6. a. The enactment of Section 502 furnished express statutory authorization for the deduction of 1½% of the Tribunal's award to appellees ($42,000), and thereby mooted

appellees' statutory challenge to assessment of a fee.[6] However, appellees argued that Section 502 is unconstitutional under the Just Compensation, Due Process and Origination Clauses of the Constitution.[7] The Claims Court rejected appellees' constitutional challenges and dismissed this suit (App., *infra,* 12a-25a). The court held that Section 502 does not contravene the Due Process Clause because Congress had a rational basis for imposing the fee on successful claimants but not unsuccessful claimants (*id.* at 19a-21a) and because Congress's decision to make Section 502 effective as of June 7, 1982, served to ensure that all claimants would be treated alike (*id.* at 23a-25a). In addition, relying on this Court's decision in *Twin City Bank* v. *Nebeker,* 167 U.S. 196, 202-203 (1897), the Claims Court held that the fact that the Iran Claims Settlement Act was added to the foreign relations authorization bill by the Senate did not violate the Origination Clause, because Section 502 is not a general revenue measure but rather provides for the collection of a fee for services rendered (App., *infra,* 21a-23a).

In rejecting appellees' challenge to Section 502 under the Just Compensation Clause (App., *infra,* 15a-19a), the Claims Court observed that virtually every regulation, tax, or fee diminishes the value of the affected property to some extent (*id.* at 17a). And the court found no constitutional defect in that consequence in this case because: (i) the economic impact of the 1½ percent fee is "very small" and is far less substantial than the regulatory burdens this Court has sustained in its taking cases, including *Keystone Bituminous Coal Ass'n* v. *DeBenedictis,* 480 U.S. 470 (1987) (App., *infra,* 16a-17a); (ii) the deduction was neither novel nor unexpected, because during the preceding 35 years Congress had authorized the United States to deduct five percent of awards made by the Foreign Claims Settlement

[6] The amount in excess of $42,000 that was withheld from appellees' award under the IOAA directive license, which required the Federal Reserve Bank to withhold two percent of awards, was refunded to appellees. See 50 Fed. Reg. 34959 (1985).

[7] The Origination Clause (Art. I, § 7, Cl. 1) provides that "All bills for raising Revenue shall originate in the House of Representatives."

Commission as reimbursement for the costs of adjudicating and settling claims against foreign governments (*id.* at 17a-18a, citing 22 U.S.C. 1621-1644m); (iii) the fee did not interfere with reasonable investment-backed expectations, because United States nationals doing business abroad necessarily assume the risk that the President may be required to exercise his established power to resolve their claims against the foreign government (App., *infra,* 17a); and (iv) appellees "significantly benefited from the Tribunal," whose activities are supported by the fee (*ibid.*).

b. The court of appeals reversed, holding that Section 502 is unconstitutional because it effects a taking of private property without payment of just compensation (App., *infra,* 1a-11a). The court acknowledged that appellees do not contend that a taking occurred on the theory that the amount awarded by the Tribunal was less than what they would have received if their suit against Iran had proceeded in the district court; but it nevertheless found a constitutional violation because the 1½% fee would not have been assessed against whatever judgment was ultimately rendered by the district court (*id.* at 7a). The court reasoned as follows: (i) appellees "had a sufficient forum and remedy in the district court, the remedy secured by the prejudgment attachment"; (ii) "[t]he Tribunal award was the substitute for a judgment by a United States court"; (iii) "the Tribunal fully paid [appellees'] claim against Iran"; and (iv) therefore the 1½% diminution in the value of the substitute award constitutes a taking (*id.* at 8a).

The court recognized that "[i]n the perhaps usual case where governmental activities must be assessed to see if they so impair private property rights as to amount to a taking," a court's inquiry is guided by three factors: " '(1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action" ' " (App., *infra,* 5a, quoting *Connolly* v. *Pension Benefit Guar. Corp.,* 475 U.S. 211, 225 (1986), and *Penn Central Transp. Corp.* v. *New York City,* 438 U.S. 104, 124 (1978)). But it noted

that this multi-factor analysis is inapplicable—and that a per se approach instead must be followed—where there is a physical occupation or appropriation of property (*id.* at 5a-6a, citing *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). The court regarded the deduction of 1½ percent of the Tribunal award as a permanent "appropriation" of the $42,000 in question, thereby triggering the per se approach of *Loretto* (App., *infra,* 6a-7a). In the court's view, Section 502 provides for "seizing a percentage of the awards of the Tribunal" to pay "for the resolution of the hostage crisis," and it believed that the government should pay compensation when it uses private claims as " 'bargaining chips' " to further the Nation's foreign policy goals (*id.* at 8a, quoting *Dames & Moore,* 453 U.S. at 691 (Powell, J., concurring in part and dissenting in part)).

The court of appeals had "no quarrel" with the proposition that "those who trade and travel abroad rely principally upon the relationships between our Government and others as the foundation for all rights"; but it did not perceive what benefit appellees realized from the Tribunal in this case, "when prior to the Accords [they] had secured the attachment of Iranian assets sufficient to cover [their] eventual award and, had the President not suspended American claims, would have had no need for the Tribunal" (App., *infra,* 8a-9a). The court therefore distinguished this case from *Shanghai Power Co.* v. *United States,* 4 Cl. Ct. 237 (1983), aff'd mem., 765 F.2d 159 (Fed. Cir.) (Table), cert. denied, 474 U.S. 909 (1985), which found no Just Compensation Clause violation in the President's settlement of claims against the People's Republic of China (PRC) for considerably less than the amount the plaintiff sought, on the ground that American claimants had no other recourse against the PRC (App., *infra,* 9a). The court similarly distinguished the consistent practice of deducting a percentage of awards made under the Foreign Claims Settlement Act (see 22 U.S.C. 1626(b)) on the ground that, in its view, the settlement agreements in those instances resolved claims for which

the claimants had no effective recourse against the foreign government concerned (App., *infra,* 10a).[8]

THE QUESTION IS SUBSTANTIAL

The court of appeals has held an Act of Congress unconstitutional. That Act imposes a modest fee on those United States claimants who have voluntarily and successfully invoked the jurisdicton of the Iran-United States Claims Tribunal to recover on their claims against Iran and its instrumentalities. The fee is set at a level that serves to reimburse the United States for the expenses it has incurred on behalf of United States claimants in making available that neutral forum for the adjudication of their claims, in maintaining the Security Account as a guaranteed source of payment of meritorious claims, and in furnishing assistance to United States claimants. A user fee that is reasonably related in this manner to the benefits conferred and the costs incurred does not constitute a "taking" of private property for a public use, for which the payment of compensation would be required. That is especially so when Section 502 of the Foreign Relations Authorization Act is viewed in the broader context of the President's long-recognized authority to settle the claims of United States nationals against a foreign government—a power that was sustained by this Court in *Dames & Moore* v. *Regan,* 453 U.S. 654 (1981), in the specific context of the settlement of claims against Iran. The court of appeals therefore clearly erred in holding Section 502 unconstitutional.

Although the fee is assessed against each award at a modest rate, the effect of the invalidation of Section 502 as applied to the Iran claims-settlement program as a whole would be very substantial. We have been informed by the Department of State and the Department of the Treasury that a total of approximately $12.7 million has been deducted from awards that have already been made by the Tribunal in favor of United States

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[8] In light of its holding that Section 502 violates the Just Compensation Clause of the Fifth Amendment, the court of appeals found it unnecessary to consider appellees' challenges under the Due Process and Origination Clauses. App., *infra,* 11a.

claimants, and they estimate that several times that amount will ultimately be deducted after all awards are made. Review by this Court therefore is warranted.

1. As the court of appeals pointed out (App., *infra*, 7a), the theory of appellees' taking argument is *not* that the $2.8 million awarded by the Tribunal is less than the amount they would have been awarded on the same claim by the United States District Court for the District of Columbia. Indeed, because appellees entered into a settlement with Iran, rather than seeking an adjudication by the Tribunal, they are estopped from contending that the amount awarded by the Tribunal is inadequate. Appellees instead argue that the deduction and payment into the United States Treasury of 1½% of the Tribunal's award constituted a taking of their property for a public use, without payment of just compensation. The court of appeals agreed. It believed that appellees had a fully adequate remedy in the federal district court, secured by their prejudgment attachments, and that because the Tribunal's award is a substitute for a judgment of the district court, any reduction in the amount of that award automatically constitutes a taking. This reasoning is seriously flawed.

a. The particular governmental action challenged by appellees in this case—the deduction and remittance to the United States of 1½% of awards made by the Tribunal in favor of United States claimants—is but one aspect of the comprehensive and complex regime established by the Algiers Accords, implementing international and financial agreements, Executive Orders, Treasury Department regulations, procedural rules of the Tribunal, and the Iran Claims Settlement Act for the purpose of resolving claims of United States nationals against Iran and its governmental entities. Viewed from one perspective, this regime regulates certain property interests (the claims or choses in action of United States nationals against Iran) by prescribing the manner in which the claims of any persons who choose to invoke the remedies secured by the President in the settlement with Iran are to be presented, decided, and paid. The reasonableness of the deduction there might be analyzed in terms of how the overall claims-settlement program affects the

property interests (claims) of appellees and other United States nationals.

There is, however, no occasion in this case to undertake an assessment of the claims-settlement regime as a whole in order to sustain the particular statutory provision that appellees challenge, because that provision is independently supported by a focused governmental justification that renders appellees' takings claim completely without merit. The deduction of 1½% from Tribunal awards in favor of United States claimants was specifically intended by Congress to reimburse the United States for the costs it incurs in connection with the arbitration and payment of claims against Iran. The deduction is, in other words, a "user fee" assessed against those claimants who have successfully availed themselves of the extraordinary procedures established by the President and approved by Congress for their benefit. The Constitution does not bar Congress from imposing a reasonable charge on those who utilize specific governmental services (cf. *Kadrmas* v. *Dickinson Pub. Schools*, No. 86-7113 (June 24, 1988)), including an adjudicatory tribunal (*United States* v. *Kras*, 409 U.S. 434, 448-449 (1973)).[9]

Although Section 502 imposes a user fee, not a tax, the principles this Court has announced in sustaining taxes against a Fifth Amendment challenge are relevant here. In the case of such general revenue measures, the Court has consistently held that the Fifth Amendment allows the government wide latitude in setting an appropriate level of taxation—even where the tax threatens the existence of the business affected—and does not

[9] The Due Process Clause has been held to bar the government from imposing a filing fee as a condition precedent to obtaining a meaningful judicial hearing in the case of an indigent plaintiff who seeks adjudication of certain fundamental claims that are uniquely subject to public resolution. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). Neither appellees nor their contractual and other claims against Iran are protected by this special rule. Compare *United States* v. *Kras*, *supra*. In any event, the fee prescribed by the Iran Claims Settlement Act is assessed only in the event that the claimaint prevails before the Tribunal. For this reason, and in light of its modest rate, the fee does not erect any barrier to access to the Tribunal and therefore raises no procedural due process concerns.

require that the amount of taxes from a particular activity be reasonably related to the cost or value of the services provided by the government to that activity. *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 622 (1981); *Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369, 376-377 (1974); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 521-523 (1937); *A. Magnano Co.* v. *Hamilton*, 292 U.S. 40, 47 (1934); *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1, 24-25 (1916); *Billings* v. *United States*, 232 U.S. 261, 282-283 (1914); *McCray* v. *United States*, 195 U.S. 27 (1904). Indeed, in *Penn Central Transp. Corp.* v. *New York City*, 438 U.S. 104 (1978), the Court identified "[e]xercises of the taxing power" as an "obvious example" of the government's power to "execute laws or programs that adversely affect recognized economic values" (*id.* at 124). Similarly, in its discussion in *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470 (1987), of the "reciprocity of advantage"[10] that supports the constitutionality of certain restrictions on the uses of property, the Court observed (*id.* at 491 n.21):

> The Takings Clause had never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received.

See also *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870).

It follows *a fortiori* from these principles applicable to *general* revenue measures that the assessment of the carefully tailored user fee in this case does not violate the Fifth Amendment. Congress set the fee at a level that is no higher than was found necessary to reimburse the United States for the approximately $4 million in expenditures it was expected to incur annually in connection with the operation of the Tribunal,

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[10] See *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922); see also *Hodel* v. *Irving*, No. 85-637 (May 18, 1987), slip op. 10.

maintenance of the Security Account, and the rendering of assistance to United States claimants. Although the Just Compensation Clause would not in any event require a close correlation between the level of the fee and the cost of the services, the court of appeals did not dispute Congress's determination that the fee constitutes "a fair approximation of the cost of benefits supplied" (*Massachusetts* v. *United States*, 435 U.S. 444, 463 n.19 (1978)).[11] Moreover, especially when compared with ordinary taxes, the amount of the fee is exceedingly modest in amount, assessed at the rate of only 1½% of an award up to $5 million and 1% in excess of that amount. Because the United States is simply passing through the reasonable cost of a governmental program that redounds to the private benefit of successful claimants, this plainly is not a case in which the government is " 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, No. 85-1199 (June 9, 1987), slip op. 13 (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)).

b. Contrary to the suggestion by the court of appeals (App., *infra*, 11a), the validity of the user fee in this case is not undermined by the fact that it is assessed only against those claimants

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[11] The Commerce Clause imposes limits on the level of user fees that the States may impose for the use of highways and other facilities and services they furnish to persons engaged in interstate commerce. However, a state user fee will be sustained as long as it bears a reasonable relationship to the value or cost of the services. See *Commonwealth Edison*, 453 U.S. at 621-622 & n.12; *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707, 712-720 (1972); *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 599 (1939); *Ingels* v. *Morf*, 300 U.S. 290, 296-297 (1937). Similarly, in *Massachusetts* v. *United States*, 435 U.S. 444 (1978), the Court held that the doctrine of intergovernmental tax immunity does not bar Congress from defraying the cost of a federal program by requiring the States, along with other users, to pay a nondiscriminatory fee that represents a fair approximation of the beneficiary's share of the costs. Although the user fee assessed against private claimants under Section 502 of the Foreign Relations Authorization Act is not subject to the special limitations imposed by the Commerce Clause or the intergovernmental immunity doctrine, the fee would satisfy those limitations as well.

who have actually received an award by the Tribunal, rather than against all United States nationals who filed claims with the Tribunal. Although a filing fee applicable to all claimants would be equally constitutional (compare *United States* v. *Kras*, *supra*), Congress reasonably could determine that only those claimants who actually receive an award realize a sufficient "benefit" from the claims-settlement apparatus to warrant the assessment of a fee. See *1985 Hearing* 109-110. Moreover, as the State Department pointed out while the bill was under consideration, "[a] fee charged to unsuccessful claimants, if more than a nominal amount, would deter some claimants (in particular the small claimants) from asserting claims," which would be "contrary to the essential purpose of the Algiers Accords to provide a forum for the resolution of the claims of *all* U.S. nationals against Iran" (*id.* at 113 (emphasis in original)). Finally, although all persons who filed claims have benefited from the existence of the Tribunal in the sense that they were afforded a forum for the adjudication of their claims, only successful claimants receive a tangible benefit from the payment mechanism afforded by the Security Account and the Federal Reserve Bank of New York, the cost of which is also defrayed by the user fee appellees challenge. The Fifth Amendment does not bar Congress from drawing on these distinctions in confining the incidence of the fee to successful claimants. *Alco Parking Corp.*, 417 U.S. at 378-379; *Brushaber*, 240 U.S. at 24-26; *Billings*, 232 U.S. at 283-284; *McCray*, 195 U.S. at 61-62.

2. a. Despite the manifest reasonableness of the fee, the court of appeals found it unconstitutional. In the court's view, the deduction of 1½% of the Tribunal's award to appellees constitutes a permanent physical "appropriation" of the $42,000 in question, thereby triggering the per se taking analysis of *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (App., *infra*, 5a-7a). However, the deduction of the $42,000 from the aggregate amount of the Tribunal's award that was paid through the Federal Reserve Bank of New York was simply the *means* by which the government collected the user fee, just as the withholding of income taxes from an employee's pay is the means by which the government collects those taxes. If the

fee itself is constitutional, as it clearly is, then the deduction of the fee prior to the Bank's distribution of the award to appellees raises no distinct constitutional difficulties.

b. The underlying justification for the fee also explains why the court of appeals erred in believing that it is akin to the governmental action that was found to violate the Just Compensation Clause in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 162-165 (1980). See App., *infra*, 6a, 8a. There, the purchaser of a company deposited funds with the clerk of the county court in order to ensure payment of debts owed by the acquired company; the clerk then deposited the funds in an interest-bearing account. When a receiver was appointed for the acquired company, the clerk paid the receiver the balance of the principal in the account, less the fee prescribed by another statutory provision (Fla. Stat. § 28.24(14) (1977)) for the clerk's services, but the clerk did not pay the receiver the interest that had been earned on the deposited funds. 449 U.S. at 156-158. This Court held that the county's retention of the interest was an unconstitutional taking of private property for a public use without payment of compensation (*id.* at 162-165). However, the Court's holding expressly rested on the premise that the interest earned on the deposited funds "was *not* a fee for services," because "any services obligation to the county was paid for and satisfied by the substantial fee charged pursuant to § 28.24 and described specifically in that statute as a fee 'for services' by the clerk's office" (*id.* at 162 (emphasis added)). See *id.* at 164-165. In this case, by contrast, the 1½% deduction from the aggregate amount of a Tribunal award *is* a "fee for services," and there is no separate statute under which such a fee is also assessed. The United States therefore has not appropriated a portion of a claimant's private property to a public use, without any further governmental justification. Accordingly, far from supporting the court of appeals' holding, *Webb's Fabulous Pharmacies* strongly supports the constitutionality of Section 502, because the Court there recognized the validity of a statute that imposes a reasonable fee to defray the cost of governmental services.

c. The difference between this case on the one hand and *Webb's Fabulous Pharmacies* on the other is further highlighted by the fact that the Iran Claims Settlement Act imposes a fee only on persons who have voluntarily invoked both the jurisdiction of the Tribunal and the special payment mechanism furnished by the Security Account and the Federal Reserve Bank of New York. As this Court explained in *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987), the Court's application of the per se analysis in *Loretto* was " 'very narrow' " and rested on the fact that cable television operators were given "compulsory access" to the private property (480 U.S. at 251 (quoting *Loretto*, 458 U.S. at 441)). Similarly, in *Webb's Fabulous Pharmacies*, the creditors of the acquired company, who were the beneficiaries of the interpleader account, had no control over the purchaser's decision to deposit the funds in the registry of the court (cf. 449 U.S. at 161-162). By contrast, in *Florida Power*, the Court stressed that the owners of the utility poles had voluntarily entered into leases with cable operators, and the terms of those leases therefore were subject to traditional police-power regulation as long as the rates were not "confiscatory." 480 U.S. at 251-253. See also *Nollan* v. *California Coastal Comm'n*, No. 86-133 (June 26, 1987), slip op. 7-8 n.2; *Bowen* v. *Gilliard*, No. 86-509 (June 25, 1987), slip op. 21; *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1007 (1984).

The principles followed in *Florida Power* are fully applicable here. Appellees voluntarily invoked the jurisdiction of the Tribunal by filing their claim, and even after appellees agreed to a settlement with Iran, they did not bypass the claims-settlement apparatus by making arrangements for direct payment by Iran, as they were free to do. Instead, appellees joined with Iran in requesting the Tribunal to enter a formal award upon agreed terms, and the Tribunal entered such an award. See pages 7-8, *supra*. Moreover, on July 8, 1982, when appellees requested the Tribunal to enter the award, the Treasury Department had already issued the directive license under the IOAA requiring the Federal Reserve Bank to deduct two percent of any such award. As a result, appellees were fully on notice that the fee

would be deducted when they set the payment process in motion.[12] Finally, as in *Florida Power*, it could not seriously be maintained in this case that the particular charge—imposed by the Iran Claims Settlement Act at the rate of 1½% for the voluntary use of the Tribunal and the payment process—is "confiscatory" in amount.

3. The court of appeals also rested its finding of a taking on the premise that appellees had a fully sufficient remedy in their suit in district court, secured by pre-judgment attachments of Iranian assets. The court reasoned that because no fee would have been deducted from a judgment awarded by the district court, and that because the award by the Tribunal was a substitute for such a judgment, any reduction in the amount of that award constitutes a taking of property for which compensation must be paid—especially since, in the court's view, appellees received no benefit from the Tribunal and the claims of appellees and other United States nationals were used as "bargaining chips" to obtain release of the hostages. App., *infra*, 7a-11a. This reasoning is wrong in every respect.

a. First, although the court of appeals was correct that under existing law no deduction would have been made from a favorable judgment of the district court if their suit against Iran had been permitted to proceed to judgment, appellees had no *property* interest in having any particular forum, or a cost-free forum, for the adjudication of their claim. Statutes governing jurisdiction and judicial procedure, like those governing the assessment of taxes, fees or other regulatory measures, are subject to revision by Congress. *Bowen* v. *Public Agencies*

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[12] Especially in view of this notice, the Fifth Amendment did not bar Congress from making Section 502 effective as of June 7, 1982, the date of the Treasury Department's directive license, since retroactive application served to cure the defects identified by the Claims Court in that license under the IOAA, and to assure that all similarly situated claimants would be treated alike. *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 223-227 (1986); *United States* v. *Darusmont*, 449 U.S. 292, 298-299 (1981); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-19 (1976); *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 302 (1937); *Graham & Foster* v. *Goodsell*, 282 U.S. 409, 429 (1931).

Opposed to Social Security Entrapment, 477 U.S. 41, 55 (1986); *National Railroad Passenger Corp.* v. *Atchison, T. & S.F.R.R.*, 470 U.S. 451, 465-470 (1985); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982); *Lynch* v. *United States*, 292 U.S. 571 (1934); *Crowell* v. *Benson*, 285 U.S. 22, 41 (1932); *Silver* v. *Silver*, 280 U.S. 117, 122-123 (1929). Accordingly, the Just Compensation Clause would not have barred Congress from enacting a law that imposed a user fee on plaintiffs who invoked the jurisdiction of the district courts and applying that statute to pending cases, including appellees' pending suit against Iran. Compare *Bradley* v. *Richmond School Bd.*, 416 U.S. 696 (1974). It follows that the Just Compensation Clause likewise did not bar Congress from imposing a user fee on those persons who invoked the alternative forum of the Iran-United States Claims Tribunal for adjudication of the same claim.

b. Second, the court of appeals considerably exaggerated the extent to which United States nationals had equivalent means for recovering on their claims against Iran before the President adhered to the Algiers Accords. As an initial matter, the President froze Iranian assets in the United States in November 1979 in response to threats by Iran to remove its assets from the United States. See page 3, *supra*. It is very likely that if the President had not acted, those assets would not have remained in the United States (and therefore would not have remained subject to attachment or execution) and would not have been available to fund the Security Account for the ultimate payment of meritorious claims against Iran. Moreover, after the President blocked the removal of Iranian assets, appellees were permitted to attach a portion of those assets only pursuant to the revocable license issued by the Secretary of the Treasury. Their attachments therefore were at all times subordinate to the power of the President under IEEPA to direct the transfer of the assets out of the United States in order to resolve the international crisis. For this reason, the Court held in *Dames & Moore* that the President's voiding of attachments as part of the overall settlement with Iran did not constitute a taking of property. 453 U.S. at 674 n.6. For present purposes, then, the

taking question must be analyzed as if appellees had never obtained attachments of Iranian assets in the United States. Yet the court of appeals largely relied upon the existence of those attachments in concluding that appellees had an equivalent remedy in federal district court. See App., *infra*, 7a, 8a, 9a; cf. *Dames & Moore*, 453 U.S. at 687.

Moreover, even putting the blocking order to one side, claimants faced a variety of obstacles to recovery against Iran in United States courts. Those obstacles included arguments by Iran in individual cases that: (1) contacts with the United States were insufficient to support jurisdiction over the particular claim under the Foreign Sovereign Immunities Act of 1976 (FSIA) (28 U.S.C. 1605); (2) the Act of State doctrine barred adjudication of expropriation and certain other claims; (3) the contracts on which American claimants sought to recover provided for resolution of disputes in Iranian courts; and (4) Iranian assets that might secure a final judgment were rendered immune from pre-judgment attachment under the FSIA (28 U.S.C. 1609) because they belonged to Iran's central bank or military (28 U.S.C. 1611(b)), because Iran had not explicitly waived its immunity from pre-judgment attachment, or because the assets did not belong to the Iranian entity against which the plaintiff had a claim (28 U.S.C. 1610). See *Iran Asset Settlement: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong., 1st Sess. 42 (1981). In *Dames & Moore*, the Court expressly noted that because the Algiers Accords "remove[ed] a number of jurisdictional and procedural impediments faced by claimants in United States courts," the government's argument that "the provision of the Claims Tribunal will actually *enhance* the opportunity for claimants to recover their claims * * * cannot be discounted" (453 U.S. at 687 (emphasis in original)).

c. Third, although appellees reached a settlement with Iran, it simply is not true that they received no benefit from the Tribunal and other elements of the claims-settlement apparatus. The Accords themselves, as well as the availability of the Tribunal as a forum for adjudication of claims and the availability of the Security Account as a guaranteed source of

payment, no doubt furnished both an initial impetus and a continuing incentive for Iran to settle appellees' individual claim. Furthermore, the entry of a formal Tribunal award furnished appellees with a number of concrete advantages. Under the Accords, the award became "final and binding" upon Iran and was "enforceable against [Iran] in the courts of any nation in accordance with its laws" (C.A. App. A23)—attributes that the settlement agreement alone would not have had. Entry of the award also entitled appellees to receive payment out of the Security Account, through the channels established by the Federal Reserve Bank as the fiscal agent of the United States, thereby eliminating the risks and costs that would have been associated with efforts by appellees to collect the award from Iran.

d. Fourth, the court of appeals seriously misstated the historical record in suggesting that the President treated the claims of appellees and other United States nationals as nothing more than "bargaining chips" to obtain the release of the American hostages and that the public therefore must bear all of the government's expenses associated with the arbitration and payment of those claims. The President of course had the discretion under IEEPA to transfer all frozen Iranian assets in the United States directly to Iran solely to obtain the release of the hostages, without assuring the availability of any of those assets to pay American claimants and without taking any steps to resolve those claims. But that is not what the President did. He provided for the retention of $1 billion in Iranian assets in the Security Account to pay American claims against Iran and furnished a forum for the adjudication of those claims. The effectiveness of that alternative forum is demonstrated by the fact (of which we have been informed by the Department of State) that the Tribunal had awarded in excess of $1 billion to United States claimants. Thus, the Court's observation in *Dames & Moore* that "there does appear to be a real 'settlement' here" (453 U.S. at 687) has been confirmed by experience.

4. For the foregoing reasons, the deduction of 1½% of the Tribunal's award in favor of appellees was fully justified in its own right as a user fee that serves to recoup the costs incurred by the United States in making the Tribunal, the Security

Account, and the Federal Reserve Bank available for the resolution and payment of appellees' claims. Imposition of a reasonable user fee for services rendered does not constitute a "taking" of private property that triggers the Fifth Amendment's obligation to pay just compensation.

The foregoing submission is sufficient to sustain the fee and dispose of this case, without regard to the factors the Court has considered in other cases that have arisen in the distinct context of challenges to regulatory measures on the ground that they adversely affect private property to a such an extent as to amount to a taking of property. In its "regulatory takings" cases, the Court has not established " 'any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be deemed a compensable taking.' " *Monsanto*, 467 U.S. at 1005, quoting *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979), and *Penn Central*, 438 U.S. at 124. Rather, "[t]he inquiry into whether a taking has occurred is essentially an 'ad hoc, factual' inquiry." *Monsanto*, 467 U.S. at 1005, quoting *Kaiser Aetna*, 444 U.S. at 175. Accord, *Pennell* v. *City of San Jose*, No. 86-753 (Feb. 24, 1988), slip op. 7; *Gilliard*, slip op. 18-19; *Hodel* v. *Irving*, No. 85-637 (May 18, 1987), slip op. 8-9; *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986). The judicial inquiry is, however, guided by consideration of three factors the Court has found to be of " ' "particular significance": (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." ' " *Gilliard*, slip op. 19, quoting *Connolly*, 475 U.S. at 224-225, and *Penn Central*, 438 U.S. at 124.

This three-factor test is not directly implicated here, because appellees have not challenged the regulation of private property interests as such, but rather have focused their challenge narrowly on the exaction of a fee. However, the fee they challenge was not exacted from funds the appellees had in hand, but was instead imposed as part of a regime (the Algiers Accords and implementing measures) that may in a sense be said to regulate a

species of private property—the claims of United States nationals against Iran—by prescribing the manner in which those claims may be presented, resolved, and paid. If the Court were inclined to consider the reasonableness of the user fee from the broader perspective of the effect that the overall claims-settlement regime has had on the claims of appellees and other United States nationals, the Court might choose to draw, at least for purposes of analogy, on some of the principles it has enunciated in its "regulatory takings" cases. Viewed even from this perspective, the fee is fully consistent with the factors the Court has considered in its "regulatory takings" cases.

First, as the Claims Court noted (App., *infra*, 16a-17a), the economic effect of the 1½% percent fee is "very small" and is far less than that involved in many of this Court's regulatory taking cases. See, *e.g.*, *Penn Central*, 438 U.S. at 125-126, 131; *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915); compare *Keystone Bituminous Coal*, 480 U.S. at 496-497. Second, appellees suffered no interference with any reasonable investment-backed expectations. The possibility that the President would find it necessary to intervene in the resolution of financial and other disputes in the area of foreign affairs is properly recognized as both a shared benefit and a shared risk of those who trade and travel abroad. See *Dames & Moore*, 453 U.S. at 679; *Chang* v. *United States*, No. 88-1120 (Fed. Cir. Oct. 13, 1988), slip op. 9-11; *Shanghai Power Co.* v. *United States*, 4 Cl. Ct. 237, 245 (1983), aff'd, 765 F.2d 159 (Fed. Cir.) (Table), cert. denied, 474 U.S. 909 (1985); compare *Connolly*, 475 U.S. at 227; *Penn Central*, 438 U.S. at 125-127.[13] Third, as we have explained, the character of the governmental action—the assessment of a user fee to defray the cost of furnishing identifiable governmental services—strongly supports the constitutionality of Section 502. In fact, the United States routinely has deducted five percent from monies distributed to its nationals following

[13] Indeed, another panel of the Federal Circuit recently held that the Algiers Accords' total extinguishment of claims against Iran by the American hostages did not interfere with "distinct investment-backed expectations." *Belk* v. *United States*, 858 F.2d 706, 710 (1988).

the lump-sum settlement of their claims against foreign governments, as reimbursement of the United States' costs associated with the settlements.[14] That established pattern negated any reasonable expectation by appellees that they would be exempt from bearing a portion of the cost of implementing any settlement that might affect claims arising out of their business in Iran.

In sum, appellees, like numerous other claimants, received significant benefits from their invocation of the Tribunal's jurisdiction and their election of the Security Account as the source of payment of their claim. Accordingly, this is not a situation where "justice and fairness" require the government, and therefore all of the people, to shoulder the costs that the government incurred in making those avenues available for resolution of their claims. Because the decision of the court of appeals could effectively require the United States to forgo many millions of dollars in fees generated by Section 502 over the course of the Iran claims-settlement program, review by this Court is warranted.

[14] More than 35 years ago, Congress amended the International Claims Settlement Act of 1949, ch. 54, 64 Stat. 13, 22 U.S.C. (& Supp. IV) 1621 *et seq.*, to provide for deduction of five percent of awards made by the International Claims Commission (now Foreign Claims Settlement Commission). 22 U.S.C. 1626(b). Since that time, Congress repeatedly has included a five percent deduction from awards in legislation relating to specific claims-settlement programs. See, *e.g.*, 22 U.S.C. 1641a(a) (Bulgaria, Hungary, Rumania, Italy, and the Soviet Union); 22 U.S.C. 1644g (East Germany). Congress continued that practice as recently as 1980, when it amended the Act to provide for determination of claims against Vietnam. 22 U.S.C. 1645h(b).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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DECEMBER 1988

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 88-1009
D.C. No. CV-85-6433-E

SPERRY CORPORATION AND SPERRY WORLD TRADE, INC.,
PLAINTIFFS-APPELLANTS

v.

UNITED STATES, DEFENDANT-APPELLEE

Decided: Aug. 10, 1988

Before: MARKEY, Chief Judge, COWEN, Senior Circuit Judge, and MAYER, Circuit Judge.

OPINION

MAYER, Circuit Judge.

Sperry Corporation and Sperry World Trade, Inc. (Sperry) appeal the judgment of the United States Claims Court, 12 Cl. Ct. 736 (1987), upholding the constitutionality of the Iran Claims Settlement Act, which requires the United States to make a deduction from awards of the Iran-United States Claims Tribunal. Because the deduction is a taking in violation of the fifth amendment of the Constitution, we reverse.

Background

On November 4, 1979, Iranian nationals seized the United States Embassy in Tehran, Iran, and took American citizens there as hostages. In response, ten days later President Carter declared a national emergency under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06, and issued an executive order blocking the removal or transfer of "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States." Exec. Order No. 12170, 3 C.F.R. 457 (1980).

In July of 1980, Sperry filed suit against Iran and fifteen of its instrumentalities in United States district court alleging breach of contract, conversion of property, and interference with business relations. It obtained a prejudgment attachment of approximately $7 million against Iranian assets in the United States. *Sperry Corp. v. Islamic Republic of Iran,* No. 80-1614 (D.D.C. Oct. 24, 1980).

On January 19, 1981, the United States and Iran entered into a series of agreements, commonly known as the Algiers Accords, to end the hostage crisis and resolve other disputes between the two countries. A stated "purpose" of the Accords was "to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration." Declaration of the Government of the Democratic and Popular Republic of Algeria, *reprinted in* 19 Selected Documents, Bureau of Public Affairs, U.S. Department of State 2, 3 (Mar. 12, 1981). To this end, the Accords called for the establishment of the Iran-United States Claims Tribunal (Tribunal) to hear claims against Iran by

United States nationals. Awards by the Tribunal are "final and binding" and come from a "Security Account" established by Iran with an initial deposit of $1 billion, and in which Iran promised to maintain a minimum balance of $500 million until all Tribunal awards are paid. The United States agreed "to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration." *Id.* The United States also agreed to transfer all Iranian assets held in the United States to Iran. Presidents Carter and Reagan issued executive orders implementing these terms, Exec. Order Nos. 12276-12285, 12294, 3 C.F.R. 104-118, 139-140 (1982), and the Supreme Court upheld them in *Dames & Moore v. Regan,* 453 U.S. 654 (1981), which contains a comprehensive description and discussion of this program.

Sperry filed a claim with the Tribunal and entered into settlement negotiations with the Iranian government. A settlement paying Sperry $2.8 million received final approval from Iran in July 1982 and the Tribunal entered an award to that effect in September. The United States, however, deducted two percent from the award pursuant to a June 7, 1982 directive license issued by the Secretary of Treasury. 47 Fed. Reg. 25243. The stated rationale for the deduction, which was authorized by the directive license only after the deadline for filing claims with the Tribunal and after Sperry and Iran had agreed in principal to settle the claims, was to "reimburse the United States Government for costs incurred for the benefit of U.S. nationals who have claims against Iran." *Id.*

Sperry promptly filed suit in the United States Claims Court alleging that the fees were "illegally exacted" and requesting that the directive license be invalidated. In a May 1, 1985 bench ruling, the court held the directive license unlawful and ordered return of the deduction. The court reasoned that under 31 U.S.C. § 9701, the Department of Treasury improperly charged for services provided by the Departments of State and Justice and that the government could not justify the decision to make a two percent deduction in the absence of evidence that the deduction was a reasonable attempt to match benefits and costs.

Before the Claims Court issued a written opinion or entered final judgment, and in response to the bench ruling, in August of 1985 Congress enacted the Iran Claims Settlement Act (Act), Pub. L. No. 99-93, Title V, §§ 501-505, 99 Stat. 437 (codified at 50 U.S.C. § 1701 note), which became Title V of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987. Section 502 of the Act provides for deductions of 1.5 percent from Tribunal awards of up to $5 million and of one percent on amounts in excess of $5 million. According to the Act, these deductions are "reimbursement to the United States Government for expenses incurred in connection with the arbitration of claims of United States claimants against Iran before that Tribunal and the maintenance of the Security Account." The deductions were to be applied retroactively to the date the directive license was issued, June 7, 1982.

Shortly thereafter, the government suggested that the Iran Claims Settlement Act had mooted the case. Sperry responded that the Act is unconstitutional because it caused a taking of property in violation of the fifth amendment; denied Sperry equal protection of law by assessing only successful claimants; violated the origination clause, art. I, § 7, cl. 1, because it was revenue legislation originating in the Senate rather than the House of Representatives; and denied Sperry due process by its retroactivity. The Claims Court rejected these arguments and dismissed the case. Sperry reasserts them here.

Discussion

Under the fifth amendment, "private property [shall not] be taken for public use, without just compensation." But the Supreme Court has yet to develop "any set formula for identifying a 'taking,' " *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986), so courts "[o]rdinarily . . . must engage in 'essentially ad hoc, factual inquiries' " of the circumstances of each case. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (emphasis added). In the perhaps usual case where governmental activities must be assessed to see if they so impair private property rights as to amount to a taking, these "inquiries" are guided by three factors of "particular significance." They are "(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.' " *Connolly*, 475 U.S. at 225 (quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978)). But this multifactor test is not invoked when there is a permanent physical occupation of property, *Loretto*, 458 U.S. at 432; *see Nollan v. California Coastal Comm'n*, 107 S.Ct. 3141, 3145 (1987), which the Supreme Court has called a *per se* taking. *Loretto*, 458 U.S. at 433; *see FCC v. Florida Power Corp.*, 107 S.Ct. 1107, 1111, 1112 (1987).

Loretto said "that a permanent physical occupation is a government action of such a unique character that it is a

taking without regard to other factors that a court might ordinarily examine." 458 U.S. at 432. In that event, the character of the governmental action is "determinative" of whether a taking has occurred, *id.* at 426, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434. The degree of impairment is relevant only to the amount of compensation due, not to whether or not there has been a taking. *Id.* at 437.

The case we have is a dispute over money which the government has permanently appropriated for its own use. The fifth amendment by its terms applies to all "private property," not only real property, as the government seems to believe. *See PruneYard Shopping Center v. Robins,* 447 U.S. 74, 82 n.6 (1980). "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' " *Loretto,* 458 U.S. at 435 (quoting *United States v. General Motors Corp.,* 323 U.S. 373, 378 (1945)). No one doubts that Sperry has lost these rights.

The government action here is akin to that in *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155 (1980), in which interest earned on funds paid by an interpleader complainant into the registry of a court pending disbursal to claimants was kept by the goverment. The Supreme Court said the government's "appropriation" of the interest is "analogous to the appropriation of the use of private property in *United States v. Causby,* 328 U.S. 256 (1946)," a physical invasion case, and is a taking. 449 U.S. at 163. The Court has also observed that " 'the multifactor inquiry [is] generally applicable to *non-possessory* governmental activity.' " *Florida Power Corp.,* 107 S.Ct. at 1112 (quoting *Loretto,* 458 U.S. at 440) (emphasis added). We have a permanent, possessory activity

by the government, so the *per se* approach of *Loretto* guides our decision.*

Dames & Moore v. Regan, 453 U.S. 654 (1981), upheld the President's authority to nullify the attachments of Iranian assets, order the transfer of the assets to Iran, and suspend claims in courts of the United States. It also said there is jurisdiction under the Tucker Act, 28 U.S.C. § 1491, to determine if the suspension of claims had led to a taking, *id.* at 689, notwithstanding 28 U.S.C. § 1502, which limits jurisdiction over claims arising out of treaties. We see this case as challenging an act of Congress, independent of any claim based on the Accords. So the Court's observation about section 1502 is not implicated.

Sperry had a prejudgment attachment of about $7 million in the district court against Iranian assets in the United States. It eventually was awarded $2.8 million by the Tribunal, but does not suggest that a taking occurred because the amount awarded was less than what it would have received from the court. So we need not enter that thicket. Sperry's point is that if it had not been forced to resort to the Tribunal because its court litigation was suspended and attachments dissolved, the deduction would not have been assessed, and it has to that extent been divested of its property, self-evidently without compensation, as a confiscatory cost recovery effort by the government.

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* In applying the multifactor takings analysis, *Connolly v. Pension Benefit Guaranty Corp.,* 475 U.S. 211, 225 (1986), first looked to the nature of the governmental action and noted that the government did "not physically invade or *permanently appropriate* any of the employer's assests for its own use." (Emphasis added.) If the Court had determined the government had permanently appropriated the *funds* in question, it would have been unnecessary to consider other factors.

The point is well taken. Sperry had a sufficient forum and remedy in the district court, the remedy secured by the prejudgment attachment, and it would have suffered no deduction from a judgment entered by the district court. The Tribunal fully paid Sperry's claim against Iran, but Congress has diminished the award by ordering the percentage withheld before the award was paid over to Sperry. The Tribunal award was the substitute for a judgment by a United States court, *cf. id.* at 687, and the deduction from it was a taking which transgressed the fifth amendment. *See Webb's Fabulous Pharmacies,* 449 U.S. at 163. It must be returned to put Sperry "in the same position monetarily as [it] would have occupied if [its] property had not been taken" *United States v. Reynolds,* 397 U.S. 14, 16 (1970).

By seizing a percentage of the awards of the Tribunal, the government has charged only successful clamants against Iran for the resolution of the hostage crisis. "The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts." *Dames & Moore,* 453 U.S. at 691 (Powell, J., concurring in part and dissenting in part). This was a national crisis and the takings clause was " 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *First English Evangelical Lutheran Church v. County of Los Angeles,* 107 S.Ct. 2378, 2388 (1987) (quoting *Armstrong v. United States,* 364 U.S. 40, 49 (1960)).

The government counters, however, that there is no taking because Sperry benefited from the Tribunal and "fails to recognize that it is well-established that those who

trade and travel abroad rely principally upon the relationships between our Government and others as the foundation for all rights." We have no quarrel with the latter proposition, but we do not see the benefit of the Tribunal to Sperry when prior to the Accords it had secured the attachment of Iranian assets sufficient to cover its eventual award and, had the President not suspended American claims, would have had no need for the Tribunal.

This was not a situation like *Shanghai Power Co. v. United States,* 4 Cl. Ct. 237 (1983), *aff'd mem.,* 765 F.2d 159 (Fed. Cir. 1985), on which the government relies, where an American claimant had no recourse against the People's Republic of China, which had years before expropriated its plant, except through the intervention of the United States. Unlike in *Shanghai,* Sperry did not need to rely on the relationship between our government and Iran to recover until the circumstances were altered by the presidential action. Indeed, in *Dames & Moore* the petitioner, situated similarly to Sperry, had already secured a judgment against Iran in district court, 453 U.S. at 666, which only the Supreme Court's decision upholding the nullification of attachments and the suspension of claims prevented of execution.

The President has broad power to resolve international disputes by settling claims, and in certain circumstances some claimants may have to bear a disproportionate burden when settlements result in less than their entitlement. *See id.* at 679. But when the President has divested them of full judicial remedies in federal courts as here, the government cannot diminish the substitute compensation of the alternative forum by arbitrarily keeping a portion for itself.

We are also unpersuaded by the government's related contention that Sperry should have expected the deduction because the United States has routinely deducted a per-

centage from funds distributed by the Foreign Claims Settlement Commission to United States nationals in settlement of claims against foreign countries. *See* 22 U.S.C. § 1626(b). The government argues that Sperry's claims are "analogous" to those handled by the Commission. On the contrary, our situation is entirely different because as we have seen Sperry, unlike claimants before the Commission, had effective recourse to the United States courts, of which it was divested. *See* H. R. Rep. 6382, 84th Cong., 1st Sess., *reprinted in* 1955 U.S. Code Cong. & Admin. News 2745, 2747; *see also* Marks & Grabow, *The President's Foreign Economic Powers after Dames & Moore v. Regan: Legislation by Acquiescence,* 68 Cornell L. Rev. 68, 89-90 (1982) (prior to the Accords, the President had never "settled the commercial claims of American citizens enforceable in United States courts"). Claimants who use the Foreign Claims Settlement Commission ordinarily are otherwise disabled from collecting from the foreign state and do indeed receive a benefit from the Commission. That was not true of Sperry and the Tribunal. And even if the deduction could be said to be "expected," the expectation could only arise after Sperry was forced to proceed before the Tribunal. But the point is, expectation or not, no deduction is assessed in the United States district court, whose jurisdiction Sperry had a right to invoke, but it was extracted from the Tribunal award, purportedly the substitute for a court judgment.

The government is uncertain whether the deduction should be viewed as a fee or a tax. The statute never refers to it as a tax but simply captions it a "[d]eduction for expenses of the United States." Pub. L. No. 99-93, § 502, 99 Stat. 437, 438. There is nothing in the hearings to suggest it is a tax; indeed, the deduction is referred to as a "fee" throughout, *e.g., Iran Claims Legislation: Hearings on S. 771 and S. 116 Before the Senate Committee on Foreign*

Relations, 99th Cong., 1st Sess. 1, 2 (1985), and both a State Department official and the department's responses to submitted questions called it a "fee." *Id.* at 15, 112, 113. We are not inclined to disagree. Nor are we inclined to get immersed in a discussion over the alternative argument that the deduction was intended as a user fee, especially in light of the improbability of the argument because the fee falls only on successful claimants, not on all who "use" the Tribunal. *Cf. Massachusetts v. United States,* 435 U.S. 444, 468 (1978). Whatever it was thought to be, it was a taking of Sperry's money to help settle the national crisis, a burden the government must bear on behalf of all of us. To the extent the Iran Claims Settlement Act put that burden on Sperry alone, it is inconsistent with the fifth amendment and cannot stand.

Our conclusion makes it unnecessary to consider Sperry's equal protection, due process, and origination clause arguments.

Conclusion

Accordingly, the judgment of the Claims Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED

APPENDIX B

UNITED STATES CLAIMS COURT

No. 660-82C

SPERRY CORPORATION, ET AL., PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

Aug. 5, 1987

OPINION

SMITH, Chief Judge.

This matter is before the court on Defendant's Suggestion of Mootness. This opinion elaborates upon an oral ruling given by the court at the close of argument on that motion. That ruling was based upon consideration of the parties submissions and oral argument.

Facts

The plaintiffs, Sperry Corporation and Sperry World Trade, Inc. (collectively "Sperry") are challenging the validity of the Iran Claims Act which was signed into law on August 16, 1985. It allowed the United States to deduct one and a half percent from any award of the Iran Claims Tribunal (Tribunal) of less than $5 million. One percent would be deducted from any amount recovered over $5 million. The deduction from the award was made retroactive to June 7, 1982. Thus, Sperry's award of $2.8 million, which was entered in September of 1982, was reduced by one and a half percent.

To understand the Iran Claims Act we must first look at the events leading up to its passage. In the late 1970's growing hostilities between the United States and the Islamic Republic of Iran resulted in a complete breakdown in relations between the two countries following the illegal detention of United States citizens by Iran. During this time, plaintiffs had various contracts with the Iranian government and many quasi-governmental bodies. These contracts dealt with leasing computer systems and performing data processing services. At the time of the hostage crisis, plaintiffs withdrew their personnel from Iran. They subsequently sued Iran and its instrumentalities in the United States District Court to recover a purported $18 million in damages. *Sperry Corp. v. Islamic Republic of Iran, No. 80-1614 (D.D.C.).* They obtained a prejudgment attachment on Iranian property located in the United States worth approximately $7 million.

On January 19, 1981, the United States entered into the Algiers Accords with Iran. The treaty was designed to end the 444 day hostage crisis and to alleviate the international crisis the Iranian revolution had caused. *See Belk v. United States,* 12 Cl.Ct. 732 (1987). In return for the release of American hostages, the United States agreed to suspend all pending litigation against Iran in United States courts, to terminate all attachments on Iranian property located in the United States and to transfer those assets back to Iran, in addition to other provisions not at issue here. The Tribunal was established in the Hague to adjudicate or otherwise dispose of outstanding claims and a security account was set up at the N.V. Settlement Bank in the Netherlands to hold Iranian funds that would be used to pay Tribunal awards. A fiscal reserve account was likewise set up by the United States at the Federal Reserve Bank of New York (FRBNY) to process awards to United States claimants.

United States claimants whose suits in federal courts were suspended by the Accords sued the government to prevent the implementation of the Accords. They charged that the terms of the compromise were beyond the President's statutory and constitutional authority and constituted a taking in violation of the Fifth Amendment. The Supreme Court, however, upheld the Accords in *Dames & Moore v. Regan,* 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981). Thus, any United States claimant wishing to pursue a claim against Iran was required to proceed through the Tribunal in the Hague.

Plaintiffs filed a claim with the Tribunal, entered into settlement negotiations with representatives of the Iranian government and settled their claims for $2.8 million on July 8, 1982. The settlement agreement was then submitted to the Tribunal and a final judgment on that amount was entered in September of 1982. Funds in the amount of plaintiffs' award were transferred from the N.V. Settlement Bank to the FRBNY on October 29, 1982. Before plaintiffs were paid, however, the FRBNY deducted two percent from the award pursuant to a directive license issued by the Secretary of the Treasury on June 7, 1982. The government's justification for the fee was to cover costs expended by the departments of Treasury, State, and Justice in the Tribunal process. The fee was authorized by the Independent Offices Appropriations Act, 31 U.S.C. § 9701 (1982) (IOAA).

The plaintiffs brought suit in this court alleging that the directive license was improper. The court through former Chief Judge Kozinski found in a ruling from the bench, on May 1, 1985, that the fee schedule was not founded upon proper consideration of the problem but was, rather, a quickly devised attempt to charge a fee for use of the Tribunal. Judge Kozinski also found that the IOAA authorized only appropriation of funds for services provided by the appropriating agency. Thus, the fee schedule which sought to deduct fees for the use of the departments of Treasury, State and Justice was invalid.

Congress, apparently in response to this ruling, enacted the Iran Claims Act, which eventually became part of the Foreign Relations Authorization Act. *See generally* Act of August 16, 1985. Pub.L. No. 99-93, Title V, 1985 U.S.Code Cong. & Admin. News (99 Stat.) 437-39. It authorized the deduction of one and a half percent from the first $5 million of a Tribunal award and one percent from any amount greater than $5 million. It was made retroactive to June 7, 1982. *Id.* at § 502(d).

Since the court's holding of May 1, 1985 is now moot if the Iran Claims Act is upheld, the plaintiffs contend as follows: that the Act works a taking of private property for public use without just compensation in violation of the Fifth Amendment to the Constitution, that the Act denies them due process of law, that it violates the Origination Clause of the Constitution, and that its retroactivity is unconstitutional. These contentions will each be addressed in turn.

Taking

The plaintiffs argue that to the extent the deduction is not a tax it is a taking under the Fifth Amendment. The takings clause provides that private property shall not be taken for public use without just compensation. The defendant, however, contends that the deduction is not a taking under the Fifth Amendment. This court's decisions in *Belk v. United States,* 12 Cl.Ct. 732 (1987) and in *Shanghai Power Co. v. United States,* 4 Cl.Ct. 237 (1983), *aff'd.,* 765 F.2d 159 (Fed.Cir.1985), *cert. denied,* 474 U.S. 909, 106 S.Ct. 279, 88 L.Ed.2d 243 (1985) deal with the standards for determining whether a taking has occurred

in the context of the exercise of the President's foreign policy powers. *Belk* concerned events at the core of the crisis involved in this case. The plaintiffs, thirteen American hostages and two of their spouses, alleged that when the United States executed the Accords it extinguished their causes of action against Iran for false imprisonment, assault and battery, etc., and therefore constituted a taking. *Shanghai Power* concerned President Carter's settlement of the plaintiff's $144 million claim against the Peoples Republic of China for about $20 million. In determining that there was not a taking in both cases we have laid out several factors. Of these factors, three are relevant and will each be discussed in determining the taking issue.

The first factor involves the degree to which a property holders rights can be impaired without working a taking. Here the plaintiffs contend that the one and a half percent deduction was a taking. The interest that the plaintiffs have is in the full amount of the award, which in this case is $2.8 million. From this award Congress has deducted one and a half percent to cover the government's expenses relating to the maintenance of the Tribunal. The degree of impairment here is very small. This is so in terms of either absolute dollars or percentages. Plaintiffs got the vast majority of their claim satisfied.

In the normal day-to-day regulatory activities of society much greater burdens are imposed upon the value of property affected by zoning laws or environmental regulations than the one and a half percentage charge here. *See generally Keystone Bituminous Coal Assn. v. DeBenedictis*, __ U.S. __, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987); *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1983); *cf. Shanghai Power*, 4 Cl.Ct. at 239 (plaintiff's claim was compromised by the President from $144 million down to $20 million, a deduction in value of eighty-six percent.) As

one of the benefits of civil society all property holders lose some value in their property with virtually every municipal regulation, tax or fee. But as Justice Holmes noted in *Pennsylvania Coal v. Mahon*, "(g)overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922). While virtually every piece of real property would be considerably more valuable if no real estate taxes were ever imposed, it can hardly be argued under current case law that such real estate taxes work a taking.

The second relevant prong of the test laid out in the cases concerns the extent to which a property owner is an incidental beneficiary of governmental action. As recognized in *Dames & Moore*, the President could dissolve the attachment that plaintiffs had on Iranian property located in the United States without working a taking. 453 U.S. at 669-74, 101 S.Ct. at 2981-83. *Shanghai Power* also recognized the problems and risks inherent in doing business in a foreign country. 4 Cl.Ct. at 244-45. Generally, if a problem develops between a United States national and a foreign country, the United States national will have to proceed through the United States government to settle its claims. These claims are unlike ordinary causes of action in domestic law. Their ultimate value depends not upon some intrinsic merit or interpretation of fixed law, but upon the many exigencies of world politics and the Nation's security needs. Thus, in the absence of the establishment and maintenance of the Tribunal by the United States there may well have been no award for the plaintiffs at all. When the matter is examined in this light, it can be seen that Sperry significantly benefited from the Tribunal.

The third relevant prong of the test is whether or not the exercise of governmental power was novel or unexpected. Sperry argues that it did not have any expectations that the

United States would deduct a fee from the settlement. In doing so Sperry cites language in the Algiers Accords which suggests that the cost of maintaining the Tribunal was to be borne equally by the United States and Iranian Governments. The court, however, finds that the cited language in the Algiers Accords was meant to delineate which portion of the cost would be borne by each side. It cannot be construed to be a promise, to United States claimants, that the government will bear the cost of maintaining the Tribunal.

Conversely, in support of its position that the deduction was neither novel and nor unexpected, the government cites the Foreign Claims Settlement Commission's (FCSC) five percent deduction from that Tribunal's awards. In the past when a national had a claim against a foreign country, the claim was settled pursuant to 22 U.S.C. §§ 1621-44m (1982). Under this system the United States collected a lump sum from the foreign country and then distributed it to its nationals with meritorious claims. Sperry is, however, not proceeding under the FCSC because the Iran Claims Tribunal was set up separately as a part of the hostage release settlement. In all other respects, though, Sperry's claims are analogous to claims made under FCSC. Since the FCSC includes a comparable deduction for services, it is not unreasonable to hold that Sperry should have expected the deductions at issue here. This is especially true in light of the fact that the United States has rarely, if ever, paid the cost of providing a forum for the settlement of its citizens claims against a foreign country. Thus, deductions from a settlement, arranged by the United States, with a foreign country are not novel ideas, nor are they unexpected.

Sperry further claims that if the deduction is upheld, it, along with other United States nationals with claims against Iran, will have borne the cost of freeing the hostages. This is not true. Sperry assumed the risk of doing business in Iran and should not complain that it did not work out as planned. Sperry is, in effect, asking the taxpayers of the United States to bear a portion of Sperry's risk of doing business in a foreign country. The deduction is part of the cost of recovering its just claim. While this may work a theoretical anomaly, a violation of the theory of justice, it is a fact of the real world that justice is not a free good. No tort victim is ever made absolutely whole. No remedy ever exactly restores the injured.

In sum the plaintiffs' allegation that the deduction effectuated a taking does not hold up. The deduction is expressly established to cover the cost of maintaining the very forum that assures United State's nationals, like Sperry, recovery on meritorious claims.

Due Process

The plaintiffs also attack the legislation on the grounds that it violates the equal protection of the laws and thus, is a denial of due process in violation of the Fifth Amendment[1]. The contention is that the deduction treats successful applicants differently than unsuccessful applicants. Unsuccessful applicants use the forum and consume valuable resources just as successful applicants do. However, successful applicants bear the cost of maintaining the Tribunal through the deduction, and unsuccessful applicants do not pay for the chance to litigate their claims.

To support their claim plaintiffs rely on the case of *Rinaldi v. Yeager*, 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966). In that case a prison inmate successfully challenged a state statute which required incarcerated

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[1] *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954) found an equal protection component within the Fifth Amendment Due Process Clause.

felons to pay for the transcript on appeal, but, did not require a felon who was convicted but not incarcerated to pay for the transcript. Plaintiffs contend that the case stands for the proposition that a scheme of reimbursement which does not evenly charge such costs violates equal protection. *Id.* at 309, 86 S.Ct. at 1499. *Rinaldi* itself, though, can be used to uphold defendant's contention that the deduction does not contravene the equal protection of the laws. *Rinaldi* states that equal protection:

> imposes a requirement of some rationality in the nature of the class singled out. To be sure the constitutional demand is not a demand that a statute necessarily apply equally to all persons. 'The constitution does not require things which are different in fact. . . . to be treated in law as though they were the same.' *Tigner v. Texas,* 310 U.S. 141, 147 [60 S.Ct. 879, 882, 84 L.Ed. 1124 (1940)].

384 U.S. at 308-09, 86 S.Ct. at 1499.

The factor distinguishing *Rinaldi* from the present case is that here all successful applicants with an award must pay the deduction. Unsuccessful applicants pay nothing. This in effect creates two different classes. The successful class and the unsuccessful class. All those within each class are treated equally. In *Rinaldi* the class constituted unsuccessful appellants who were irrationally broken down into those who were incarcerated and those who were not. Those who were incarcerated paid and those who were not incarcerated (but nevertheless found guilty) did not pay. This scheme was invidious as well as unsupported by any rational purpose.

In the present case, Congress, along with the State Department reasoned that to charge all users a more than nominal fee would discourage use of the Tribunal to settle Americans claims against Iran. *Iran Claims Legislation:*

Hearings on S.771 and S.1136 Before the Senate Committee on Foreign Relations, 99th Cong., 1st Sess. 114 (1985) (State Department responses to additional questions submitted for the record). This suggests a rational basis for charging successful claimants and not charging unsuccessful claimants.

Origination Clause

The plaintiffs third major argument begins with the Origination Clause of the Constitution. According to plaintiffs' position, the Senate may amend or otherwise attach revenue raising amendments to a House bill which raises revenue, but, may not attach a revenue raising bill to a nonrevenue raising House bill. This is a correct statement of the law as the court understands it. However, the plaintiffs make a fundamental mistake in the application of the Origination Clause to the facts of this case. The preliminary question to be answered is whether the Senate bill is the type of revenue raising bill which must originate in the House of Representatives.

The Origination Clause provides that: "All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose and concur with amendments as on other bills." U.S. Const. art. 1, § 7, Cl. 1. The analysis of an Origination Clause problem is straightforward. The first question is whether the bill in question is revenue raising. In *Twin City Bank v. Nebeker,* 167 U.S. 196, 17 S.Ct. 766, 42 L.Ed. 134 (1897) the Supreme Court declined to define the phrase "bills for raising revenue" stating:

> What bills belong to that class is a question of such magnitude and importance that it is the part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject. It is suffi-

> cient in the present case to say that an act of Congress providing a national currency secured by a pledge of bonds of the United States, and which, in the furtherance of that object, and also to meet the expenses attending the execution of the act, imposed a tax on the notes in circulation . . . , is clearly not a revenue bill which the Constitution declares must originate in the House of Representatives.

Id. at 202, 17 S.Ct. at 769.

The Court went on to quote Mr. Justice Story:

> the practical construction of the Constitution and the history of the origin of the constitutional provision in question proves that revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which incidentally create revenue. 1 Story on Const. § 880.

Id. at 202-03, 17 S.Ct. at 769.

> Thus, the Court has declared that only those bills which levy taxes in the strict sense of the word are revenue raising. The Supreme Court has defined "tax" as "a charge, a pecuniary burden, for the support of government." *United States v. Baltimore Railroad Co.*, 84 U.S. (17 Wall) 322, 326, 21 L.Ed. 597 (1872). The Supreme Court's statement in *Twin City Bank* that "there was no purpose . . . to raise revenue to be applied in meeting the expenses or obligations of government" is consistent with this construction of the meaning of "tax". *Id.*

The law in question here is known as the Iran Claims Act. The Act was introduced into the Senate on May 17, 1985 by Senators Evans and Lugar to "promote the prompt and efficient processing of claims made by United States citizens and corporations against the government of Iran." 131 Cong.Rec. S6489-90 (Daily Ed. May 17, 1985)

(Statement of Senator Evans.) The Iran Claims Settlement Act became part of the Foreign Relations Appropriations Act, 131 Cong.Rec. H6812 (Daily Ed. July 30, 1985). The purpose of the Foreign Relations Authorizations Act is to authorize appropriations for fiscal years 1986 and 1987 for the Department of State and various other agencies within the foreign relations field. *See generally* Pub.L. No. 99-93, 1985 U.S.Code Cong.Admin.News (99 Stat.) 405.

The Iran Claims Act was designed to provide a forum for United States nationals to litigate their claims against the government of Iran. To reasonably allocate the cost of maintaining the Tribunal, Congress enacted a one and a half percent charge to be applied against the monies awarded successful claimants. There can be no doubt that the act raises revenue. The question is however, does it raise revenue in such a matter that it should have originated in the House rather than the Senate? The answer must be no. The purpose of the act is not to levy taxes in the strict sense of the word (i.e. to support the government) but to expedite the settlement of claims against Iran and to pass the cost of maintaining the Tribunal on to those who ultimately benefit most from it. Thus, any revenue raising is incidental to the purpose of the Act and therefore does not violate the Origination Clause.

Retroactivity

The plaintiffs final attack on the constitutionality of the legislation involves the Due Process Clause of the Fifth Amendment. Plaintiffs state that the legislation as applied retroactively back to June 7, 1982 violates the Due Process Clause of the Fifth Amendment. This contention is fairly easily dealt with. It is well known that the courts will be extremely deferential to Congress where economic legislation is in controversy and will not overturn legislation

unless it does not have any rational basis. *See Pension Benefit Guarantee Corp. v. R.A. Gray Co.*, 467 U.S. 717, 729, 104 S.Ct. 2709, 2717, 81 L.Ed.2d 601 (1984). While this view has come under recent thoughtful criticism, *see generally* Economic Liberties and the Judiciary, 4 Cato Journal 661 (Winter 1985) it is at present the paradigm under which federal courts decide cases. *See generally United States v. Carolene Products Co.*, 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937); *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934). In *Pension Benefit* the Supreme Court upheld legislation which retroactively created liability for employers who dropped their pension plans. Congress found that without the legislation many companies would have withdrawn from their pension plans. The Court held that this was a rational basis.

This is a considerably easier case. Here Congress has found that it would be unfair to place the burden of maintaining the Tribunal solely on those who were not fortunate enough to have their claims heard early, especially in light of the arbitrary manner in which claims were heard. Congress also found that in the absence of retroactivity those with small claims would bear an undue burden because of the Iranian government's insistence on hearing the larger claims first. *Iran Claims Legislation: Hearings on* S.771 and S.1166 *Before the Senate Committee on Foreign Relations*, 99th Cong. 1st Sess. 120 (1985) (State Department responses to additional questions submitted for the record).

Plaintiffs finally contend that the legislation cannot be applied retroactively since they had no notice. The plaintiff in *Pension Benefit* made the same argument. The Court did not answer the question of whether notice was constitutionally compelled. The Court did, however,

answer plaintiffs' assertion by assuming that notice was compelled and then suggested that plaintiff had notice under ERISA and from the various legislative proposals debated by the Congress. This is analogous to the present case in that Congress had at various times considered legislation authorizing a deduction, *Id.* and the Foreign Claims Settlement Commission had previously used a five percent charge much like the smaller one and a half percent deduction in question here. 22 U.S.C. § 1626(b) (1982).

As long as Congress has some reason for enacting legislation, it will be considered rationally based. *Pension Benefit*, 104 S.Ct. at 2718. Here, Congress had valid reasons to enact the legislation and did not act in a purely arbitrary manner when making it retroactive.

Conclusion

The court concludes that Title V of the Foreign Relations Authorization Act is constitutional. Thus, the prior decision of the Claims Court in the plaintiffs favor is moot. The Clerk is directed to dismiss plaintiffs' claims. Each side is to bear its own costs.

APPENDIX C

UNITED STATES CLAIMS COURT

No. 660-82 C

SPERRY CORP., ET AL, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

Transcript of Proceedings
Washington, D.C.
May 1, 1985

BENCH RULING

By: Judge ALEX KOZINSKI.

[139] THE COURT: Well, I think we've come to the end of the road.

Thank you, all for very, very fine arguments, and a very find briefing in what is really a very complicated little case.

The most difficult issue, in my view, is the jurisdictional issue: the question of whether or not this case does or does not fall within the treaty exception, 28 U.S.C. Section 1502.

The Court takes little comfort from the fact that there was only one vote in *Shanghai Power* suggesting the treaty exception applied in that case.

The four other judges went to the merits, but that is because the lower court's opinion dealt with the merits. It is probably easier to review than getting into a whole new area.

So, I think the question is a close one. The case, it seems to me, falls squarely within, or rather, between the precedents. It is, on the one hand, not a situation exactly like *Weld* because, in *Weld,* there really was an espousal, a settlement and then an Act of Congress upon which the claimants could rely. They could point to the Act of Congress as their entitlement to the money [140] in question.

In *Great Western* and other cases cited by the defendants, there was really only the treaty, only the international agreement. The claim such as existed prior to that had been espoused by the United States had been extinguished.

So, whatever rights existed belonged to the United States; and, if rights belonged to anybody but the United States, one would have to look at the terms of the treaty and figure that out.

In this case, it is really hybrid, and neither of the lines of precedents really cover it.

On the one hand, we have a claim that grows out of a commercial claim, and it was originally filed in District Court here. There was a prejudgment attachment. It was a claim that one can loosely say, based on the common law—although we know that one cannot sue foreign governments under the common law—but under the Foreign Sovereign Immunities Act, suit was brought and was proceeding along.

Of course, we do not know what the outcome of the lawsuit has been. We do not know what, if any, jurisdictional questions might have existed. But, in any case, we know there was a claim; we know it was brought; we know it was presented to the Court; we know there was a prejudgment attachment.

[141] So, we know that there was a commercial basis to the claim.

Now, what the Algiers Accords did to that claim is really somewhat unusual and very difficult to put into a proper legal pigeonhole. The Algiers Accords, defendant tells us, did not purport to take up the claim, did not purport to espouse the claim, did not purport to appropriate for the United States the claim.

As we all know, the Sovereign can do that. The Sovereign can take the claims of a private party, make them its own by espousing them, and then either pay or not pay, as it is deemed appropriate, the money over to the claimant, if, in fact, it recovers anything.

But the government has been very careful to say that that did not happen here, that the Algiers Accords provided a forum, provided a mechanism for satisfying the claims; and, therefore, the United States really is not the owner of the claims.

Whatever else is clear, I think Mr. Cohen has made it clear that the United States is not an owner of either the claims or the resulting judgments, except, of course, if there is a claim for the 2 percent itself.

The question, then, is the claim to what came out at the other end, which is the tribunal award, is that something that is based on the original common law, so [142] to speak, a claim, or commercial claims that existed before the Algiers Accords; or is it then, or is all of it substantially based upon the tribunal award and tribunal award being something that grows out of the treaty or the international agreement?

I think it is a closed question and, given that, the question is closed. One looks at the policies of the act to see whether or not assumption of jurisdiction in this case were going to follow what Congress had, the evil Congress sought to avoid in passing the exception. And I rely on defendant's assertion what those purposes are as they appear from the legislative history and from the cases.

The one was fear of this kind of claim involves large sums of money. Well, we've calculated it here, even under the most extreme circumstances. Well, they are not talking about very large sums of money; they are talking pretty big money.

But $50 million, $100 million is not the kind of claim that is so significant in light of other jurisdictions this Court has that one would say, "Gee, this is something that Congress would inherently have wanted to preserve for itself."

Even if on talks about the full amount of the possible awards made by the Iranian Claims Tribunal, which [143] up to now have been something on the order of $200-$300 million. It's really not an astounding amount of money. But we're not; we are talking only about 2 percent of that amount and even in the extreme circumstance that a billion or even two billion dollars of claims are paid out, the amount in question will not be that huge that this particular policy would be offended.

The second one policy that defense counselor has raised is that Congress wished to reserve power to act in these areas. But, of course, that is not a situation where Congress has acted, so I'm not quite sure which way that policy cuts, if it has any implication at all.

This situation where the executive has acted pursuant to standing Congressional authority, if indeed there was any authority at all for the fee, is the Independent Office Appropriation Act, which is a statute having nothing to do with either foreign relations or peculiarly with this fact situation.

So, if we have a situation where Congressional exercise of power were in question, this policy would be implicated, but it's not like the situation where the United States espouses a claim, gets a lump-sum settlement, and then Congress has to think about what are we doing [*sic*] to do

with the money—"How should we allocate this?"—as they have done frequently in the past.

[144] Congress hasn't acted and doesn't appear to be interested in acting. We were talking about an exercise of executive authority, so really the powers of Congress are not seriously implicated.

The most important consideration is: Will this interfere with our foreign relations?

This is a clear policy of this statute that the defendant's counsel has suggested, that exercise of the Court's authority in this area might somehow cause deception in our foreign relations, might embarrass the President, or our government or negotiators, or the Department of State.

These are serious types of concerns. They are not to be lightly disregarded, and the Court has in other opinions given significant deference to these concerns—in one case, too much deference; and in another case, the Court of Appeals seems to have thought that too much deference or too much concern was expressed on that score.

But even exercising the same kind of concern in this case, it is very difficult to find the point of the policy implications of a jurisdictional ruling or a ruling on the merits in this case.

There is no need to interpret the treaty or rather the Algiers Accords. The terms of the Algiers Accords have never been in dispute, have never been an issue in [145] the case. The plaintiffs are not seeking to second guess the awards process. They are not seeking to invalidate the tribunal or the awards process. They are not seeking to, in any way, undermine anything that happened on the other side of the ocean.

What they are concerned with is deduction of a fee that happened once the money got to the United States in the hands of federal agencies. The New York Fed might not be an agency for some purposes, but it was an agent of the

United States when it received the money because, as we have learned, it is only a central bank that can receive funds from another central bank.

The deduction occurred on this side of the ocean, and the issue presented is really a relatively narrow one, one that the Court deals with all the time.

Is the fee appropriate under a federal statute, the Independent Office Appropriation Act? And a subsidiary issue: Were any applicable procedural requirements followed, presumably the APA, Administrative Procedure Act?

Those are the kinds of issues that this Court deals with on a regular basis, that other Courts deal with on a regular basis, and that would cause significantly less—in this Court—embarrassment, the possibility of embarrassment, the possibility of entanglement in our foreign relations, and could possibly have happened in [146] the *Langenneger* case, which, once again, the Court of Appeals felt again there was too much deference off of their process.

This is a much weaker case for an argument of actual entanglement in the Court in foreign relations. The questions are statutory, procedural, run-of-the-mill, everyday questions of statutory and regulatory law.

Although the question is not free from doubt, the Court assumes jurisdiction and goes on to the merits of the claim.

A number of arguments have been raised, and the issues, I think, have been presented fairly squarely. If the United States is entitled to promulgate or entitled to, was entitled to and properly did promulgate the fee under the Independent Office Appropriation Act, then it is entitled to keep the money and the plaintiff loses.

If the United States maintained the fee without statutory authority authorization, either because it did not follow the statute or did not follow the procedural require-

ments or, in some other way, the processes are otherwise defective, the plaintiff wins and gets to take its money, unless an argument of laches or some sort of equitable doctrine like that were to prevail. I don't see any disagreement; those are the issues.

And, so, we have to turn to the Independent Office Appropriation Act, and one examines the Act, and one examines [147] the precedents and examines what happened in this case, and a number of problems present themselves.

The first one is that it is quite clear that the IOAA calls for promulgations of fee schedules by regulation, and "by regulation" has been understood and interpreted to mean "by regulations promulgated in accordance with the Administrative Procedure Act."

I do not think there was any doubt on that point, and I am not quite sure whether this was conceded in this case. It certainly was conceded in *Bunge,* and I do not think there is any doubt on that point.

The question was whether or not the fee schedule here in question was promulgated by APA and, of course, there were no notice and comment procedures followed. The record discloses that Treasury officials really did not think this was a regulation at all. This was something to kind of publish, as a courtesy.

Some concern is expressed that claimants would resist this, and so why put something out for comment when you know you are going to get bad comments back and people are going to object. Of course, that is the purpose of the notice and comment procedures of the Administrative Procedure Act, and whether one thinks that is good law or bad law, it does not matter; it is the law.

And [illegible]ear that one would get bad comments is not [148] a good reason not to follow the law.

Now, it is absolutely clear on this record that, at least on the record as presented, that no thought was given at the

time to the foreign relations exception which has now been raised by the government.

How do we know that? Well, we have a memorandum, the June 4 memorandum, which is Exhibit Number 16 of plaintiff's appendix, and it says:

"This is not a regulation. We don't have to publish it."

So, what does it say? Well, we decided it was not a regulation, and we did not have to publish it for that reason, but, at the same time, there was talk about the foreign policy implcations and here is really the reason why we did not do it.

Nevertheless, we have an explanation from somebody who was apparently in a position to know, and reasons have been given by Mr. Michael as to why the APA exception was, in fact, applicable and why it was not appropriate to have published it and the foreign policy implications such a publication would have had.

The Court accepts that. I think that although there is a great deal of skepticism that can be expressed about what actually happened on the record, this is a particular exception that ought to be more generously applied [149] by the Courts, and that if, in fact, the Court is persuaded, even looking back with some hindsight, that the concerns expressed are reasonable, that they are the kinds of concerns that could properly have been invoked, but not publications of any sort. The Court is inclined to accept them and expresses skepticism as to whether that was, in fact, what happened but nevertheless continuing on down this path of allowing great leeway to the Executive Branch when it gets embarrassed with foreign relations, the Court is willing to say, it is close during skepticism, but it is probably just good enough.

So, we will go on from there. The Court rules that the failure to comply with the APA notice and comment procedures was appropriate because, in effect, an exception

was, in fact, available; but it is aware of other cases that have stated you have to give your reasons right in the publication; you have to give them contemporaneously and whatnot.

The Court will not be that strict. We will accept the comments as given. They seem reasonable, and if that were the only problem, then a fee schedule ought to be approved.

Unfortunately, there are much more serious substantive problems with the fee schedule, and it is difficult to put one's finger on what the worst problem [150] is, and not casting aspersions on anybody, there seems to have been less than the appropriate amount of consideration given to the IOAA, its legal requirements, and the responsibilities of the government in promulgating or in issuing this type of fee schedule.

The Court is aware of the fact that there might have been time pressures, but we are not talking about war; we are not talking about national disaster; we are talking about the question of whether the United States could have held on if it chose to do that, to people's awards for six weeks, three months, six months, at the most, while it saw through the process and came up with a lawful course of action.

There might have been some problems with that. It may be that some claimants would have not liked that, the early claimants, but nothing has been raised that really suggests that this was a real national emergency, that one had to act or else lives would be lost or property would be damaged or whatnot.

This is a convenience. They wanted their money. Nobody though about it, and such lawyering as appears on the record is thin, very thin; and the result is that the fee that has come up with does not even meet the basic requirements of the statute.

For one thing, the statute talks about fees being [151] charged by an agency on an agency-by-agency basis. I think one can twist the language and turn the language to get something else out of it, but I think that a plain English reading of simple words can lead only to the conclusion that the agency may promulgate a fee for services that it provides.

Here is the language:

"It is the sense of Congress that each service or thing of value provided by an agency"—skipping the parenthetical—" to a person, to an agency purported to be self-sustaining to the extent possible."

And then it says:

"The head of each agency may proscribe regulations establishing the charge for service or thing of value provided by the agency."

Now, we can get into questions of what it means to provide a service by an agency, and the Court is inclined to say that if an agency pays for something out of its own budget, it is a service or thing of value provided by the agency.

For example, if Treasury paid out of its appropriation for the NV Settlement Fund or for the operation of the tribunal, or whatnot—and, again, I assume that the information given is correct; there has been no challenge to it. I assume that much of those things are paid out [152] of the Treasury account. Then, there are things of value that arguably are provided by the agency. It does not have to be agency employees who are providing it. If the agency pays for it, and it come out of the agency's appropriations, fine. That's a benefit provided by the agency.

But an agency cannot charge fees for some benefit or service or thing of value provided by another agency, and no amount of twisting of the language of the statute will reach that result.

So, insofar as the fee schedule purported to charge the plaintiffs or anybody else for fees that were not expended for services that were not paid for by Treasury appropriation, either by payment of the salaries of Treasury employees, by payment directly out of Treasury funds, or by payment of fees of the tribunal or whatnot, the fee is invalid because it has concluded in its calculation amounts which are not properly chargeable in a fee schedule issued by the Secretary of the Treasury.

It is highly possible that the Secretary of State could issue a separate fee schedule. The Attorney General, if he feels that the Department of Justice is providing services, it is conceivable that he could provide a separate fee schedule as well.

And there is one thing that is clear is that [153] head of each agency may proscribe fee schedules for benefits provided by their agency; and the fee insofar as in promulgating a fee, the Secretary of the Treasury took into account services provided by other federal agencies, such as the Department of State and the Department of Justice, it is defective. It is a charge for things that they could not properly charge.

Now, we have in the appendix of Exhibit Number 15 a June third memorandum which seems to indicate that among the services charged for are Department of State activity and Department of Justice activity.

But we have something better than that. We have a brief from the defendant in this case detailing all the great things that the government did, and continues to do for these claimants and listed in – this is the original brief – all the statements about how State Department officials are doing all these fine and wonderful things and the Department of Justice officials are doing these things.

It is quite clear that the Department of the Treasury did take these types of service into account, services provided

by other federal agencies and to that extent the fee schedule is invalid.

Moving on to the even more serious problems of the fee schedule, it has to do with the manner in which [154] a fee schedule must be promulgated – and, again, putting to one side the notice and comment requirements of APA, which have been dealt with before.

But what kind of process must an agency go through in promulgating a fee schedule?

What is the kind of thought it must give? What is the kind of documentation it must provide?

What is the system of fact-finding and allocation and calculation that an agency must engage in, in adopting a proper fee schedule under the IOAA?

Now, it is a little bit of an odd question because we have never really seen a case like this before.

In the *Bunge* case, which we saw, we have what looked like a continued – which, again, was not an IOAA case but was close.

What we had was a continuing attempt to make the fees fit the services. Well, it was not a very good job; it was kind of sloppy. It got kind of a slow start, and they were not very good at it.

But they were trying. They had their eye on the ball, and they tried to do the best they could. We had all those D.C. Circuit cases which the Court has expressed some skepticism over, and they were reversed, or perhaps this Court would have issued a different result.

But what is significant about the case is that [155] the agency had actually spent a considerable amount of time trying to make an allocation. It turned out not to be good enough for the D.C. Circuit, but it was something.

What we have here is nothing – absolutely nothing. And defendant who is in the best position to come forward with

something, if there were, has come up with nothing. What we have is a memorandum dated June 3, 1982, detailing the assumptions that were made on how to charge the fee, or, rather, an assumption as to what the costs would be included.

From that we know, of course, that certain services were charged for which could not properly be charged for. But there is nothing to support this memorandum, nothing to suggest why the estimates, the basis for the estimate—it says, for example: "Total awards in excess of $4 billion."

One is baffled, looking at that figure, to know why Leonard E. Santos thought $4 billion rather than $3.5 billion, or $7 billion, or $2 billion, or $1 billion was the appropriate figure.

If one stops to think about it, the escrow account itself was a billion dollars. Presumably, the United States would have negotiated these accords, or thought about what an appropriate escrow account would be, in light of the likely claims.

How one gets to $4 billion? One does not know. [156] Ten-year life for the the tribunal security account? No indication whatsoever what that estimate was based on. Was it a guess? Was it a model? Was it a figure picked out of the air? Was it as far forward as this particular government official could predict?

It just baffles one as to what lies behind these assumptions.

"Annual cost of approximately $8 million." I assume there was some basis for these figures, but it is difficult to tell.

For example, there is an allocation for $.7 million—$700,000, $.7 million—for "miscellaneous direct and indirect costs—Treasury, Justice, and State."

But, ultimately, there was something behind this memorandum that these are not the musings of one official. It

may be the calculations; it maybe got published; it may be there are facts; it may be that there is talk of documentation, but all we're told is we are in a big hurry, and we really did not have time to think about it. It does not lead one to believe that, in fact, there is much substance behind this. If there had been, the Court is confident that the defendant would have come up with it, either by way of documentation or by way of affidavits.

If there was a meeting and nothing was committed to paper, if there were various documents that had to be [157] pulled together, if it was done in some fashion other than normal government memorandum process, surely finding this kind of data involved more than a single individual. It must have involved—or should have involved, or ought to have involved—dozens of people pulling information, estimates, and the like from all quarters of the government.

I cannot believe that we do not have a stack of affidavits a foot high detailing the thought process that went into making these assumptions. They may be valid, but all the court can tell is that it is just a guess.

Now, the reason this all matters is because the Court has to review these things to see whether the agency, in fact, thought about the right things.

The Court is being asked by the government to say: "Well, they did the best they could. They were under pressure, and, golly gee, you know, it was a tough time, and they did the best they could."

And under those circumstances, the Court ought to defer.

The Court is all for deferring. The Court deferred in *Bunge*, in what was a terribly sloppy business, but there was an effort; it was a process; there were people out there thinking about it, and they were doing their best.

When the Court is convinced that people are doing their best, it is likely to step back and say: "Who knows? [158] Maybe they were under pressure; maybe they were involved in, maybe these are very difficult things to document or verify, or whatnot, but here was an attempt. Here is what they did to meet the statutory standards and come up with a conclusion and the Court will defer."

There is nothing to defer to in this case. There is nothing to defer to. And this is just talking about the easy part of the equation, and that is the cost side of the equation. There should not have been any difficulty at all in finding some reasonably substantial documentation for all of this.

Now, the other part of the equation—that is when one gets into probably the most serious difficulties of this fee schedule, is the allocation of the fees to the class of claimants, or the class of those who have made claims before the tribunal.

And here there is not an exaggeration but a plain statement of fact, to say there is zero, nothing in the record to suggest any thought as to what the benefits were that were being conferred upon the people who are going to be charged the fee, and no thought at all in relating those benefits to the costs incurred by the government, and somehow coming up with a fee that reasonably attempted to match benefits and costs.

It is all the Court can tell from every indication [159] that the record discloses, Treasury officials looked at the pattern of the past and said:

"Well, Congress used to charge 5 percent on fees. We will charge—we will use the same kind of formula, but we will use 2 percent of an award in the past in foreign, let's say, claims awards."

The award is paid out, and the Congress authorized the 5 percent fee.

Of course, the 5 percent fee authorized by Congress is a tax. That is what it all is. Congress has decided that it is really not a fee at all. What it is is a tax. Congress said: "We will deduct 5 percent from your award."

Congress can do that. As Justice Douglas recognized in *NCTA*, Congress can decide to subsidize some and to charge more to others. It can decide to relay costs to benefits, or can decide to ignore them.

An agency of the Executive Branch simply does not have that authority. And, insofar as the model that was being followed was the Congressional model of imposing a 5 percent fee, a flat fee, it was a cross model. It is a model that had no applicability to the situation.

They were following a practice of a body that had authorities that an agency of the Executive Branch does not have.

The difficulties with a fee system are manifold, [160] and the Court will only mention a few of them. For one thing, all the fees are allocated, or all of the costs, all of the benefits are allocated to only a portion of the claims.

Now, the Court is not saying that government could not subsidize some claimants and decide not to subsidize others.

But what an agency cannot do under the IOAA is to take all the expenses of a project and then charge only part of the recipients of the benefit.

Congress could, if it wished to, separate out a class of beneficiaries, separate out the costs attributable to providing them the benefit, and then allocate costs among the remaining beneficiaries and say, "Well, the government is going to pick up the tab for the rest of it."

And looking back at the June 3, 1982, memorandum, it is quite clear that in determining what the costs were and what the benefits were. All of the costs of running the

tribunal were allocated to determining the fee schedule, the 2 percent fee.

There is, of course, a very large class of claimants who gets no benefits—who gets a substantial benefit but pays nothing at all and calls themselves "losers." Losers, just like winners, profit from the existence of [161] a tribunal. It may very well be that there are losers who go through weeks of trial, taking up the time of the tribunal, the rent of the building, presumably imposing various costs upon our own government's lawyers who have got to monitor the process, extend the life of the tribunal so that the United States has to incur continuing expenses in running it, and accomplish nothing or very little.

They are charged nothing, or very little by way of fees, whereas claimants who settle or who get an award through litigation get charged on a percentage basis, covering presumably the entire cost of running a tribunal.

The other difficulty, one of the difficulties, apparently, is a class of benefits that is provided by the United States that did not accrue to this plaintiff at all and may not accrue to many of the claimants of the tribunal.

Another service is provided by State Department attorneys who actually represent, the Court understands, interests of small claimants before the tribunal.

Now, here is another situation of a shared benefit where all the costs are allocated to one party. Here is a case of no benefit being conferred on one group of people and yet being charged for providing them benefits—no justification whatsoever under the IOAA for charging claimants who have their own attorneys and are represented by their [162] own attorneys at the tribunals for providing lawyer services for other claimants.

I heard the defense counsel's suggestion to the contrary, and I do not think there is anything there, simply insofar

as the Department of the Treasury is purporting to charge the plaintiff here for services provided by State Department employees in representing other claimants, it is exercising a legislative function, taking from the poor, giving to the rich.

It may be O.K. for Congress to do it; it is not O.K. for the Department of the Treasury under the Independent Office Appropriation Act.

Finally, it is difficult to list these problems in order of their severity.

The percentage fee itself is a suspect mechanism because regardless of allocations which we have talked about, whether the amounts loaded into the costs are appropriate amounts to be loaded in, assuming those are correct, assuming that everybody gets charges across-the-board, losers and winners, a fee that varies with the amount of the award does not on an *a priori* basis have a rational relationship to the benefits that are likely to have been derived by the claimant.

Now, the Court is not saying that a case could not be made for that kind of relationship, that a case [163] could not be made on the facts for establishing such a relationship. It could be shown, for example, that a billion dollar claim, or a $50 million claim imposes proportionately greater costs upon the tribunal process than does a million claim or a $50,000 claim. It is possible, just not beyond the realm of possibility.

No factual showing like that has been made in this case, and it is moreover the kind of relationship that is counter-intuitive, and does not immediately jump to mind.

Litigating a million-dollar claim does not, in the Court's experience, necessarily entail more or proportionately more, or, let's say, ten times more, costs than litigating a $100,000 claim. There might be a relationship there, but

again, there might not. There are many claims involving large sums of money that get resolved on summary judgment or that get settled, or that involve little or no burdens on the process; and then there are those $50,000 claims that live with us forever.

And, again, the Court does not mean to suggest that under a proper set of circumstances a relationship of that Court could not be shown, or some relationship could not be shown where a graduated fee, where some claimants get charged more than others, could not be justified. But it has to be justified; and the fee, as it is here instituted, [164] particularly with respect to this plaintiff, seems to bear no relationship at all to actual costs that have been imposed upon the process, on the one hand, or the benefit derived from the process, on the other.

And nothing has been presented by the defendant to suggest that such a relationship exists or such a relationship could be established.

Now, once again, one has to step back and try to determine what the Court's function is and what is the appropriate allocation of functions between the Court and the agencies of the Executive Branch.

The Court in this case is operating really in a vacuum. Much of what has been advanced to support the fee in this case are conjectures, to some extent, after the fact, suppositions of what could have done and what might have been done.

There has also been a suggestion that, "Oh, this is the best that could have been done. I mean, we really did the best we could under the circumstances."

But this is patently not the case. Agencies can do better, and agencies have done better.

There was not so much, as the record discloses, as a detailed examination of what the precedents in the IOAA area call for, even the discredited D.C. Circuit, which,

after all, is a place where such regulations can [165] be challenged.

Nothing suggests that Treasury officials thought about the process, considered the responsibilities under the process, considered the limitations, considered the severe constitutional question: the question of whether or not an agency of the Executive Branch can act as if it were a committee of a House of Congress.

Now, the Court recognizes there are difficulties in the process. The Court recognizes that the process cannot all be perfect, that reasonable relationships are subject to reason.

What is the reasonable relationship between one thing and another is something that reasonable people can differ over.

But the Court has to have some sense that the process was, in fact, engaged in, that the agency recognizes responsibility under the Act and did its best under the circumstances.

The Court is not persuaded that that is the case. In this record, it simply appears that everybody was in a rush to get on with the process, that there was some pressure from claimants to release the settlements quickly.

A memorandum was written citing two Supreme Court opinions, without citation, without analysis, and simply stating: "Of course, we have lots of power to do this," [166] pointing to what is a false light of the Congressional practice of allocating a fee on the basis of the award made, and then everybody got on merrily with saying this is not a regulation at all, we don't need to publish it; and then going ahead and deducting the fee.

The Court cannot criticize the way in which—will not criticize the way in which Executive Branch officials perform their business. They have lots of things to do; this is obviously a matter of some concern, and that was some that needed to be handled quickly.

All the Court can say, or can look at, is whether or not the Executive Branch or the agency in question has, in fact, done its job—has, in fact done that which the Court can defer to, and say: "The Court will not step into this area because those charged by law with implementing the statute have done their job."

This is not such a case, and it just seems absolutely clear that the nuances, the difficult issues of the Independent Office Appropriation Act were not considered, did not attract anybody's attention. It is the kind of fact-finding and sensitive weighing and balancing to stay within the Supreme Court's directives, to say nothing about the D.C. Circuit directives—just simply did not take place.

For that reason, the fee is invalid; and that [167] is the end of the matter.

Now, the defendant has suggested that there might have been laches involved, somewhat like in the *Bunge* case. It is kind of a belated claim, but it was raised belatedly in *Bunge* too.

Bunge was a different case, however. In *Bunge*, there were actual benefits that had gone back to the claimants themselves, or rather the class of people for whom the claimants were a part, which meant that the fund that claimants said was improperly collected had been depleted, and had been depleted to benefit the very class of the plaintiffs in that case.

Moreover, the plaintiffs in that case were in this business and were engaged in paying these fees and dealing with FGIS—Federal Grants Inspection Service—on this issue on a continuing basis from the date the regulations were promulgated, or rather were not promulgated on the day that the fee schedules went into effect, even before that.

In this case, as far as this particular plaintiff is concerned, they, of course, were in the process; they were in

the claims process, but no doubt they were busy in Iran not knowing whether or not they were going to get anything for their money, and they were busy negotiating that.

[168] The earliest date really the Court can charge these plaintiffs with having responsibility to do something would have been September 14, the date of the award. Before that, they did not know whether, in fact, they would get an award, the size of the award, what interest they would have.

Now, if this would have been six years later, it would have been different. We are really only talking about the difference between June and September—four months, six months, or something of that sort. I am not sure that, in any case, this would be a long enough period for a claim of laches to have matured.

But, in any case, no later than October 1, these claimants or these plaintiffs brought their claims to the attention of Treasury officials, and, frankly, until this day it has been carefully ignored. It is not as if the government said: "Gee, you know, as soon as we found out our mistake, potential mistake, a possible problem, we went out, and we did it right. Look at them, they did not let us know earlier on their part."

The case has been—it is now almost three years, certainly more than two-and-a-half years that Treasury officials should have known of their error and any objective analysis of the law should have allowed them to predict the Court' substantive result.

[169] Of course, defendant does have a pretty good jurisdictional argument, and that alone, of course, would be a reason not to give up on this particular case.

But one just talks about trying to do the right thing, or the claim being—"Well, we didn't know we had a problem

until it was brought to our attention"—surely, when the claim was brought to defendant's attention, even though they were inclined to fix the problem, they had every opportunity between October 1, 1982, and this date to do so.

Counsel for the government represents that this has not been done. It is a little difficult to really give much credence to the claim of laches, both because of the shortness of the time period, the time in which claimant's claim arose and defendant's failure to really move very quickly once they did find out there was a problem.

So, the Court rules that it had jurisdiction, that Independent Office Appropriation Act applies, that the Treasury to directive license failed to comply with the Independent Office Appropriation Act, and for that reason the fee is not valid.

The defendant has suggested that if there is the result the Court finally comes to, that the appropriate methodology is to order a remand rather than a judgment for the plaintiff. The Court is not going to take that [170] approach.

The question in this Court, unlike the district courts—the question in this Court is not the propriety of the agency's procedure in and of itself. The question is: Did the government grant the money under appropriate authority?

And, if the Court is convinced that the government did not take the money under lawful authority, it cannot very well allow the Government to keep it, even for a minute.

So, having found that there was no authority to keep the 2 percent, the Court is constrained to enter a judgment ordering or rather calling for the repayment.

I want to be careful to—that everybody understand my ruling.

There is nothing about what the Court has said today that speaks to what the effect, if any, would be of a

properly promulgated fee, if a fee is properly promulgated and issued, vis-a-vis futher [*sic*] or past claimants before the tribunal.

That issued was not raised, and the Court expresses no view as to whether the defendant can go back, come up with a proper fee schedule, impose it from that point forward, or you can go backways and impose it upon this claimant or other claimants.

That question is not being adjudicated today, [171] and has not been briefed, and frankly, I have no idea what the answer to that question is. I certainly do not express the view that something ought to be done, or ought not to be done.

I am simply making clear that the Court's ruling today is that retaining the fee pursuant to directive licensing at the time when it was retained was unlawful because the directive license was unlawful, and the money now has to be returned.

Future cases will take care of themselves, of course.

That's it.

Anything else I can do or say?

Want to settle?

MR. SEIVER: I don't think there is anything else I have. The motion for class certification, I believe, is still pending. We did not argue or address that today.

THE COURT: Yes. Well, I am inclined to deny that motion. I think that this probably takes care of the case.

I am inclined to write an opinion in this case, but I could be talked out of it. I have also got a bunch of other things that come ahead, and I know the plaintiff wants his money badly.

So, do you have a view on the question of my [172] opinion?

MR. SEIVER: Your Honor, we would prefer an opinion. I would understand, though, the judgment which was

rendered today from the Bench would be properly appealable as a final Order of the Court, and the reasoning which the Court has given would be sufficient.

So as not to delay any expected appeal by the government, we would think that the Court could certify it now, that this is the judgment and that the opinion would follow and perhaps the Federal Circuit would not want to take an appeal at this time.

We would prefer an opinion, though, whether or not it holds up the appeal process or not.

THE COURT: O.K.

Mr. Cohen, what's your view?

MR. COHEN: Well, I'd like to consult with my client, Your Honor.

THE COURT: Maybe we could all come back in a week or two; you tell me you have all settled and the case has gone away.

Order a transcript, and read it to your client.

MR. COHEN: Yes, I think it's—

THE COURT: I mean you are going to spend another year on appeals, and whatnot, and probably wind up in the same place and be more money behind.

[173] How about this? Why don't you all come back in a week or two, and maybe there is some way of resolving this case. You have my ruling. I will stick by it.

I am inclined to write an opinion, but I would like to hear what you say, Mr. Cohen. If I write an opinion, I am not inclined to send the judgment out and then follow it up. I will hold on to the case until I write it.

What do you thing [*sic*]?

MR. SEIVER: I think that would be fine, Your Honor, and, as long as—maybe I should direct this to the Court Reporter, about obtaining a transcript as quickly as possible.

THE COURT: Anybody can buy a transcript. Just take it up with the Reporter.

MR. SEIVER: O.K.

THE COURT: I mean, any litigant can.

All right, shall we make it two weeks?

MR. COHEN: That would be fine with me, Your Honor.

THE COURT: I have heard it all now. It is not final until the Supreme Court denies the hearing for what it is worth.

MR. SEIVER: May 15, Your Honor?

(Pause)

[174] THE COURT: How about the 14th, at 10 o'clock? It is a Tuesday. I am going to be in here for something else anyway. I would like to hear how you are doing. Just a brief get-together, O.K.?

MR. SEIVER: That is fine.

MR. COHEN: Fine.

THE COURT: Again, a very excellent job on both sides, both arguing and briefing and the like.

It's always a great pleasure for me to see a good advocacy.

MR. SEIVER: Thank you.

MR. COHEN: Thank you.

(Whereupon, at 2:06 p.m., the hearing was adjourned.)

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 88-1009

SPERRY CORPORATION AND
SPERRY WORLD TRADE, INC., APPELLANTS

v.

THE UNITED STATES, APPELLEE

[Filed Sept. 8, 1988]

NOTICE OF APPEAL

NOW COMES Appellee the United States by its attorneys and gives notice pursuant to 28 U.S.C. § 1252 of its appeal to the Supreme Court of the United States from the decision and judgment entered in this action on August 10, 1988.

Respectfully submitted,

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MOTION

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JAN 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE UNITED STATES OF AMERICA,
Appellant,

v.

SPERRY CORPORATION AND
SPERRY WORLD TRADE, INC.,
Appellees.

On Appeal From The United States Court Of Appeals For The Federal Circuit

APPELLEES' MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

The government has asked the Court to review a decision by the Federal Circuit finding the Iran Claims Settlement Act unconstitutional for violating the Takings Clause of the fifth amendment. The question presented on the takings issue is more appropriately restated as follows:

1. Whether the court of appeals correctly found that legislative authorization of deductions from awards of the Iran-United States Claims Tribunal ("Tribunal") imposes the costs of implementing foreign policy objectives upon a discrete few and thus is a taking of property for public use without compensation, in violation of the fifth amendment to the Constitution.

Appellees also challenged the legislation on separate constitutional grounds below, which are reasserted here. The questions presented on those issues are:

2. Whether the three-year retroactive application of the legislation authorizing deductions from Tribunal awards is unconstitutional as an abrupt change in policy and encouragement of official misconduct because the Claims Court determined in its prior Bench Ruling that the Treasury illegally made those same deductions;

3. Whether deducting from Tribunal awards the costs of establishing and operating the Tribunal is a denial of equal protection of the law by impermissibly allocating all the costs of the Tribunal to only a portion of the claimants who proceeded there, and thus creating an impermissible classification for purposes of assessing such costs; and

4. Whether the legislation authorizing deductions from Tribunal awards is unconstitutional under the Origination Clause of the Constitution because it raises revenue but was improperly originated in the Senate.

PARTIES TO THE PROCEEDINGS BELOW

Appellees Sperry Corporation and Sperry World Trade, Inc., a wholly owned subsidiary of Sperry Corporation, were the plaintiffs in the United States Claims Court and Appellants in the United States Court of Appeals for the Federal Circuit. The United States of America was the defendant in the Claims Court and Appellee in the Federal Circuit.

Pursuant to Rule 28.1, Appellees state that the real party in interest is UNISYS Corporation, the successor to Sperry Corporation following the merger of Sperry Corporation and Burroughs Corporation, and renamed as of November 16, 1987.[1]

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[1] Shares of Sperry Corporation and Burroughs Corporation may still be outstanding. Other affiliates and subsidiaries of UNISYS, which are not wholly owned, include: BMX Holdings Ltd., Burmex Holding Sweden Aktiebolag, STS Ltd., Plasma Graphics Corp., Japan Softec Co., Ltd., Tata Burroughs Ltd., Sperry Arabia Ltd., C3 Pty. Ltd., Compubur, S.A. de C.V., Harrison Credit Group, Inc., Nippon Univac Kaisha, Ltd., and Oki Univac Kaisha, Ltd.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-952

THE UNITED STATES OF AMERICA,
Appellant,

v.

SPERRY CORPORATION AND
SPERRY WORLD TRADE, INC.,
Appellees.

On Appeal From The United States Court Of Appeals For The Federal Circuit

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APPELLEES' MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, Appellees Sperry Corporation and Sperry World Trade, Inc. move to dismiss the appeal filed by the United States or, in the alternative, to affirm the judgment below, on the grounds that the question presented is so insubstantial—and the decision below manifestly correct—so as to preclude the need for further argument.

ADDITIONAL CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the provision set forth in Appellant's jurisdictional statement, this motion also requires consider-

ation of the Origination and Due Process Clauses of the Constitution.[2]

1. Article I, § 7, cl. 1 provides in pertinent part:

   All Bills for raising revenue shall originate in the House of Representatives; . . .

2. The fifth amendment to the Constitution provides in pertinent part:

   No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .

STATEMENT

On December 17, 1982, Appellees Sperry Corporation and Sperry World Trade, Inc. (collectively "Sperry") commenced an action in the United States Claims Court on behalf of themselves and a class of persons and other entities similarly situated who had claims pending before the Iran-United States Claims Tribunal ("Tribunal") and whose awards or payments from the Tribunal were uniformly reduced by a two percent fee imposed by and paid to the United States Department of Treasury ("Treasury") under the authority of a Directive License.

Sperry, as well as other American nationals and corporations, previously had litigation pending in the courts of the United States against Iran and various Iranian instrumentalities. That litigation was suspended involuntarily by the agreement between Iran and the United States on January 19, 1981 in return for the release of fifty-two American diplomats and citizens held hostage since November 4, 1979. As part of these agreements, more popularly known as the Algiers Accords, the United States and Iran further agreed to establish an arbitral tribunal to decide some of the suspended claims. Sperry asserted

[2] Appellees also include in an appendix to this motion ("App.") excerpts from the Algiers Accords, Executive Orders and other legislative and administrative materials relevant to the Court's consideration of the questions presented.

in the Claims Court that Treasury did not have the authority to issue the Directive License assessing deductions against the awards of the Tribunal and that Treasury also failed to follow applicable statutory requirements in promulgating the Directive License. Sperry argued that the deductions from arbitral awards were, therefore, a taking of property in violation of the fifth amendment.

The Claims Court agreed. Former Chief Judge Kozinski found the Directive License invalid, and directed the government to return the fees it had collected from Sperry. May 1, 1985 Bench Ruling, Appendix to Appellant's Jurisdictional Statement ("J.S.App.") 49a. Within three weeks of the Bench Ruling, however, legislation was introduced in the Senate which was eventually passed and signed into law in August, retroactively authorizing deductions from Tribunal awards. Thereafter, the government suggested that the action in the Claims Court was moot and sought dismissal of Sperry's claims. Sperry challenged Defendant's suggestion of mootness on the grounds that the retroactive legislation was unconstitutional.[3] The Claims Court (per newly appointed Chief Judge Smith) found the retroactive legislation constitutional and dismissed Sperry's claims as moot. J.S.App. 25a. Sperry appealed this dismissal and on August 10, 1988, the Federal Circuit reversed the Claims Court and found the legislatively imposed deductions violative of the fifth amendment's Takings Clause. J.S.App. 11a.[4]

The government asserts jurisdiction of its appeal here under 28 U.S.C. § 1252 based upon the Federal Circuit's ruling that the Iran Claims Settlement Act is inconsistent with the fifth amendment. While ostensibly within the Court's mandatory appellate jurisdiction, the Court may summarily affirm if the question presented is insubstantial

[3] Sperry asserted that the Iran Claims Settlement Act violated the Takings Clause as well as the Due Process and Origination Clauses of the Constitution.

[4] Because the court of appeals found for Sperry on that claim, it did not pass on Sperry's other constitutional challenges. *Id.*

or dismiss for other reasons demonstrating that the Court should not set the case for argument.[5] Although finding an act of Congress unconstitutional is serious and substantial for Sperry and the class of claimants who stand to receive refunds of fees illegally collected, the arguments presented by the government are not substantial enough to require further review here. The government has not shown a clear error below and thus, the questions implicated by the appeal are so insubstantial as to require no further argument. The government has also not shown that the total amount of money at stake is so substantial that further review is required[6] or that there are conflicts in the lower courts of appeals[7] or that the decision below clearly conflicts with established precedent in this Court.[8] While these factors are not directly implicated by the Court's jurisdictional rules, they are part of the overall

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[5] The Court is "not obligated to grant plenary consideration" for a case within its appellate jurisdiction. Hicks v. Miranda, 422 U.S. 332, 344 (1975). Indeed, the repeal of 28 U.S.C. § 1252 (effective 45 days after the court of appeals' decision) was in response to the Court's need to eliminate any requirement for hearing all such cases on the merits. 134 Cong. Rec. H3989 (daily ed. June 7, 1988).

[6] Currently, a little over $12 million is at stake, and ultimately the amount may approach $30 million, an amount clearly substantial to Sperry and other claimants, but not to the government. *Cf.* J.S.App. 29a.

[7] No other similar case is pending. The government hints that the decision by the Federal Circuit in Belk v. United States, 858 F.2d 706 (Fed.Cir. 1988), may be at odds with the decision below. J.S. 26, n.13. However, *Belk* did not involve a "physical invasion of property," *id.* at 709, and thus is quite different from the exaction of funds at issue here.

[8] The Court has regularly noted that fifth amendment takings cases require essentially ad hoc inquiries and further review here would likely contribute little to constitutional jurisprudence. Indeed, the issue of charging fees against arbitral awards and assessing owners of commercial claims for the costs of implementing foreign policy objectives is not likely to arise in this context again. Consequently, any issues decided summarily here would not inevitably impair respect for the Court's constitutional decisionmaking. *Cf.* Sidle v. Majors, 429 U.S. 945 (1976) (Brennan, J., dissenting from denial of *certiorari*).

consideration for determining which appeal cases merit plenary consideration. *See Sidle v. Majors*, 429 U.S. 945 (1976) (Brennan, J., dissenting from denial of *certiorari*) ("... it was properly perceived that behind our summary dispositions of appeals lie many of the same considerations that account for denials of certiorari"). The facts and decision below amply demonstrate the lack of error or need for further argument.

When the United States and Iran signed the Algiers Accords, the government ended the hostage crisis by obtaining the release of the hostages and agreeing to: (1) terminate all proceedings against Iran in the United States courts; (2) nullify all attachments of Iranian property obtained in those proceedings; (3) prohibit further litigation based on such claims; and (4) bring about a resolution of such claims through arbitration before the Iran-United States Claims Tribunal. It was further agreed that the United States would deposit $1 billion of Iranian assets in a security account to satisfy awards made by the Tribunal. The terms of these agreements, including the dissolution of the attachments and suspension of litigation, were thereafter embodied in various Executive Orders.[9]

Many litigants whose actions against Iran were suspended sought to prevent enforcement of the various Executive Orders and Treasury regulations implementing the Algiers Accords, charging that the Executive's actions worked an unconstitutional taking in violation of the fifth amendment. In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court upheld the Executive's suspension of the litigation and dissolution of the attachments of Iranian property, but only as an "incident to the resolution of a major foreign policy dispute between our country and another..." *Id.* at 688. While the establishment of the Tri-

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[9] J.S. 6; SMF ¶¶9-11, Exhibits in support of Sperry's Motion for Summary Judgment ("Ex" or "Exs"), nos. 3-5; J.A. 27. "R.___" refers to the record by way of the numbered entry on the docket sheets included in the Joint Appendix filed in the court of appeals, at 10-18. Where the item referenced in the record is in that Joint Appendix, the page number within is listed as "J.A. ___".

bunal was viewed as a forum where the claimants could ultimately receive something in return for the suspension of their claims, *id.* at 687, the Court noted that the establishment of the Tribunal was "of vital importance to the United States." *Id.* at 688 (quoting S.Rep. No. 97-71 at 5 (1981)) (App. 7a). The Court recognized that the President was furthering foreign policy goals by using American claims against Iran as "bargaining chips" when it suspended the claims. *Id.* at 691. (Powell, J. concurring).[10] Thus, foreign policy was central in the decision to suspend and refer claims to the Tribunal.[11]

As a result of the Court's decision, any American company that wished to pursue a claim against Iran was required to file its claim with the Tribunal established at The Hague. App. 4a. As provided for in the Algiers Accords, all claims had to be filed with the Tribunal no later than January 19, 1982. App. 5a. Since its establishment, the Tribunal has disposed of jurisdictional arguments relating to some claims, adjudicated other claims, and approved settlements for payment from the Security Account by issuing "Awards on Agreed Terms." As of June 30, 1988, almost 400 awards had been made.

Sperry made very limited use of the Tribunal's procedures in disposing of its claim against Iran. Sperry commenced settlement negotiations with representatives of the Iranian government in August 1981. Sperry filed its claim

[10] The "deluge of claims exerted considerable pressure on the Iranian government, and gave the United States a powerful tool in the negotiations for the release of the hostages." Note, *Dames & Moore v. Regan—Rights in Conflict: The Fifth Amendment Held Hostage*, 31 Am.U.L.Rev. 345, 384 (1982).

[11] The Court did not reach the issue of whether the suspension of the litigation itself was a "taking" in violation of the fifth amendment because that issue was not ripe for determination. *Dames & Moore*, 453 U.S. at 689. However, the Court held that such a claim could be asserted in the United States Claims Court under the Tucker Act, 28 U.S.C. § 1491, and that such an action would not be barred by the treaty exception to the Claims Court's jurisdiction embodied in 28 U.S.C. § 1502. *Id.* at 689-90.

at the Tribunal in January 1982 and in February reached a settlement with Iran calling for payment of $2.8 million to Sperry, R. 49, Ex. 25, with final approval by the Iranian government given on July 8, 1982.[12] Thereafter, Sperry and the Iranian government filed a joint application to have the settlement entered as an "Award on Agreed Terms." The award was entered on September 14, 1982, as amended on September 22, 1982. R. 43, ¶¶20-22, R. 43, Ex. 6. The amount of the award, less the two percent deducted and paid to the Treasury, was forwarded to Sperry in October. R. 43, ¶¶23-24.

In June 1982, six months after the January filing deadline for all claims before the Tribunal, and four months after Sperry had agreed in principal to the settlement of its claims against Iran, the Treasury issued its Directive License authorizing the Federal Reserve Bank of New York to deduct two percent from funds representing every Tribunal award (contested or agreed) transferred to it from the Security Account, prior to transferring the funds to the appropriate claimant.[13] J.A. 39. The Directive License was issued to purportedly reimburse the government for the costs of operating the Tribunal. *Id.* Sperry protested the contemplated two percent deduction from its Tribunal award and after Treasury rejected the protest, Sperry commenced an action on behalf of itself and those similarly situated to recover fees illegally deducted from Tribunal awards. The Claims Court ultimately found for Sperry, holding the Directive License invalid and directing that the deductions be returned. J.S.App. 48a-49a.[14]

[12] Notwithstanding the record, the government mistakenly asserts that this settlement was not reached until July 1982. J.S. 7.

[13] The government erroneously states that the Directive License was issued *before* the Tribunal rendered any award in favor of a U.S. claimant. J.S. 7. The Directive License was issued on the day *payment* of the first award was due, which award had already been rendered in favor of a U.S. claimant. App. 10a.

[14] The Claims Court initially denied Sperry's motion for class certification. J.S. 8, n.5. The government omitted the fact that this denial was on the grounds that the class was not sufficiently numerous. J.A.

Although the Directive License listed a number of purported authorities for the two percent deductions, the Claims Court found that the only potential authority was the Independent Offices Appropriations Act, 31 U.S.C. §§ 9701 *et seq.* ("IOAA"). J.S.App. 31a. The Directive License, however, did not comply with the IOAA's requirements for establishing a schedule for collection of reasonable fees to reimburse various costs, and instead resembled an unlawful executive tax. J.S.App. 41a.

The defects in the Directive License were legion. Although the Claims Court did not invalidate the Directive License because it was issued without notice or opportunity for comment, the court found that

> [u]nfortunately, there are much more serious substantive problems with the fee schedule and it is difficult to put one's finger on what the worst problem is, and not casting aspersions on anybody, there seems to have been less than the appropriate amount of consideration given to the IOAA, its legal requirements and the responsibilities of the government in promulgating and issuing this type of fee schedule.

J.S.App. 34a. In particular, the Claims Court found that Treasury improperly sought to recover costs of other agencies (J.S App. 35a-37a); that there was absolutely nothing to justify the amounts to be deducted, the costs to be reimbursed, or any effort made at allocating costs and benefits (J.S.App. 37a-40a)[15] that costs were allocated only to a portion of the claimants at the Tribunal (J.S.App. 41a-42a); and that the percentage fee was "suspect" itself and "counter-intuitive" as no rational basis was put for-

55. Sperry subsequently moved for class certification when the class had expanded (and as of the May 1985 Bench Ruling was approximately 175) but the court did not rule on the motion and it is still pending. J.S. App. 49a.

[15] "What we have here is nothing—absolutely nothing. And defendant who is in the best position to come forward with something, if there were, has come up with nothing." J.S. App. 37a-38a.

ward to justify a fee which varies with the amount of the award (J.S.App. 42-45a). The Claims Court was not persuaded at all that the government had made any effort to think out the fees or to justify the Directive License—as "everybody was in a rush" (J.S.App. 45a)—and found that the IOAA issues were never actually considered (J.S.App. 46a). The Claims Court therefore found the Directive License invalid and the deductions unauthorized, and expressed its intention to enter judgment for Sperry. J.S.App. 48a.

The Court issued its ruling from the bench on May 1, 1985, but withheld writing an opinion to give government counsel time to consult and possibly resolve the matter by settlement. J.S.App. 50a. Although the government agreed with Sperry at the subsequent status hearing on May 14, 1985, that a written opinion was warranted, it immediately sought legislation, introduced on May 17, 1985, in the Senate as The Iran Claims Settlement Act, which retroactively authorized deductions from all arbitral awards issued by the Tribunal for the prior three years, back to June 7, 1982. J.A. 94; 131 Cong. Rec. H6489 (daily ed. May 17, 1985). The Act was designed specifically to overturn the Bench Ruling. *Id.*; 50 U.S.C. § 1701 note.

While it is true that Congress "reacted immediately," J.S. 8, the August 1985 legislation was actually the third time the executive sought congressional action on the subject of deductions from Tribunal awards.[16] None of this prior legislation ever made it to the floor of either chamber. However, less than three weeks after the Claims Court's Bench Ruling in May 1985 (some two years after the last failed attempt at legislation) the government again sought relief from Congress and this time Congress delivered. Congress, however, was not determining that a "user fee" was appropriate; indeed, it acknowledged that charg-

[16] On two other occasions subsequent to the issuance of the Directive License, the Executive sought legislation to retroactively authorize the two percent deductions. R. 43, Exs. 18 and 21 at 5g, R. 43, SMF ¶¶48-49.

ing for the costs of the Tribunal was controversial. J.A. 95. Yet, its focus was on retroactively authorizing illegal administrative action, as evidenced by the concern for maintaining in the public treasury those funds already wrongfully collected.

> The validity of [the Directive License] has been challenged in the U.S. Claims Court. The chief judge of that court recently indicated his intent to enter a decision adverse to the United States. *As a result, without our legislation, the entire amount collected to date would be subject to refund by decisions of that court.*
>
> Our legislation would ensure that the bulk of the amounts recovered to date, over $6 million, would remain in the Treasury. Further, it would guarantee that an additional $12 to $20 million in revenues, which the Department of State estimates would be collected under our bill, would go into the Treasury to offset the deficit. J.A. 95. (emphasis added).

The government's action was shortsighted. The Tribunal and its processes did far more than provide a forum for the resolution of private claims. Ending the extraordinary tensions created by Iran's seizure and illegal detention of the hostages, and resolving a most difficult international crisis were the genuine purposes behind the Accords and the establishment of the Tribunal. The suspension and referral of private American claims to a newly-established Tribunal were thus part of the effort to achieve the Nation's foreign policy objectives.[17] In this situation

> [t]he Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held

[17] From the beginning, disposing of the litigation pending in U.S. courts was part of Iran's demands for releasing the hostages. App. 1a.

> by relatively few persons and subject to the jurisdiction of our courts.

Dames & Moore, 453 U.S. at 691 (Powell, J., concurring) (footnote omitted). Congress ignored this precept in seeking to charge the successful claimants at the Tribunal with the costs of settling the hostage crisis.

The government also seeks to favorably exploit a difference between the legislative and administrative schemes of deductions. Whereas Treasury imposed a flat two percent fee, the new legislation imposed slightly lower fees.[18] However, this difference does not make the deductions at issue "reasonable" or make any fee "carefully tailored." J.S. 16, 17. Revenue-based fees bear no rational relationship to costs and benefits and thus cannot be charitably characterized as "reasonable" or "user fees."[19] Although Senator Evans' reasoning for adopting a tiered percentage recognizes some of the defects in using a flat revenue-based fee, using the administration's prior two percent fee as a "base" from which to make adjustments compounds the original error and exposes the arbitrariness of the cost recovery efforts. In noting the inadequate support for Treasury's revenue-based deductions initially, the Claims Court stated that it was

> ". . . not an exaggeration but a plain statement of fact, to say *there is zero, nothing in the record* to suggest any thought as to what the benefits were that were being conferred upon the people who are going to be charged the fee, *and no thought at all* in relating those benefits to the

[18] The rationale for this change was Senator Evans' (belated) recognition that some of the benefits flowing from the establishment and operation of the Tribunal inured directly to the government and thus could not be charged to private claimants. J.A. 95. The extent of these benefits was never calculated and no attempt was ever made to reasonably allocate any of the associated costs.

[19] Revenue-based fees are similar to "volumetric" or "earning capacity" fees and are wholly unrelated to costs or benefits associated with the use of the Tribunal. *See infra* note 33.

> costs incurred by the government, and somehow coming up with a fee that reasonably attempted to match benefits and costs."

J.S.App. 40a (emphasis supplied).[20] In the absence of any thoughtful approach to determine a reasonable fee now beyond the simple conclusion that a lower percentage is "fairer," the proposed fee under the legislation is, like Treasury's two percent fee, *not* reasonably related to its stated express purpose of cost recovery.

Nevertheless, Congress made clear its intention no only to provide retroactive authorization to upset the Claims Court's judgment, but to change substantively legislative policy and authorize in part previously unauthorized collections of fees. Importantly, Congress was not exercising or delegating its taxing power, it was legislating "unequivocal authority" to retain money previously collected illegally. J.A. 95. That this was a complete change in policy is evidenced by the following: (1) the Algiers Accords provided for the *governments* of Iran and the United States to share the Tribunal's expenses, App. 6a;[21] (2) the Executive Order provided for discharge of claims only upon *full payment* of Tribunal awards to claimants, App. 3a; and (3) Congress' statement that due to the "vital importance" of the Tribunal to the United States, the *State Department* was to devote sufficient personnel and resources to enable the U.S. to effectively and expeditiously represent the interests of American citizens before the Tribunal. App. 7a. Thus, eighteen months after settling the hostage crisis, six months after the deadline for filing claims at the Tribunal and on the day of the payment of the first Tribunal award, Treasury unilaterally, but unconstitutionally, sought to change policy. Congress' subsequent appearance to retroactively authorize this conduct cannot survive constitutional scrutiny.

[20] The Claims Court found it baffling that there were *no* affidavits, *nothing* to support the assumptions as to total awards, *nothing* to support the assumptions as to total costs: "Was it a guess? Was it a model? Was it a figure picked out of the air? . . ." J.S.App. 38a. Nothing further was offered in Congress to support any level of fees. The State Department only made some additional unsupported estimates of costs and U.S. contributions to the Tribunal in response to two of the additional questions submitted for the record at the hearings. J.A. 160. Notwithstanding, the government has repeatedly stated in its brief that the fees are "reasonable" and even cited its own testimony as evidence of what Congress "could" have determined. J.S. 18. Such statements by interested parties in hearings, of course, are of no significance in determining what Congress actually did or did not do. Kelly v. Robinson, 479 U.S. 36, 51 n.13 (1986).

[21] The Accords also provided that the UNCITRAL rules would control the procedures of the Tribunal, except as modified by the parties. App. 5a. Those rules provide that the *losing* party assume the costs of a tribunal's processes, Article 40 § 1, and to the extent the Accords modified that by providing that the *governments* bear the costs equally, there is no authority for the government then to try and foist the costs upon the *winning* party.

ARGUMENT

I. The Government's Assertion Of Error Is Insubstantial

A. The Iran Claims Settlement Act Works A Taking Of Property Without Compensation

The underlying claims against the Iranians processed at the Tribunal were commercial claims, most of which had been secured by substantial attachments on frozen Iranian assets in this country. The Federal Circuit agreed with Sperry's argument that the suspension of these claims was part of the overall resolution of the hostage crisis, the costs of which the government cannot force Sperry to assume by way of deductions from Tribunal awards. J.S. App. 11a. The court also agreed that the appropriate analysis was that of a *per se* taking. J.S.App. 5a-6a. In its jurisdictional statement, however, the government embarks on an analysis of the conduct of foreign relations, Commerce Clause "user fee" cases, and whether claimants may be said to have "benefited" from use of the Tribunal.[22] The government's analysis fails in all respects.

[22] The government also claims the deductions were part of the "regime" of the Algiers Accords, the measures "implementing" them in

The government repeatedly suggests that the deductions from the Tribunal awards were "user fees," "modest" in amount, and "reasonable," given Sperry's "voluntary" use of the Tribunal. (J.S. 13, 17, 18 and 20). However, Sperry was *forced* to use the Tribunal by the terms of the Algiers Accords, and the modesty of an illegal exaction is not part of any prescribed analysis. The claims of reasonableness for the deductions are also without support. The government then urges the Court not to demand "reasonableness" for user fees, invoking the shield of decisions construing Congress' *taxing power*, notwithstanding the fact that Congress never even purported to exercise its taxing power. J.S. 15. This apparent confusion is not accidental, as noted below, and is created so as to allow a deduction masquerading as a "user fee" slide by as a "tax." *See* J.S.App. 10a-11a.[23]

Although the President had the statutory authority to nullify attachments and transfer previously frozen assets out of the country, *Dames & Moore*, 453 U.S. at 674, the suspension of claims, not directly authorized by statute, was justified under general principles of executive power in the area of foreign affairs. *Id.* at 678-80. Implicit in the authorization of this executive action was the presence of the alternative forum and a remedy in the Claims Court to redress any claim that the suspension of litigation in the United States courts or the non-payment or reduction of awards was a taking in violation of the fifth amendment.

January 1981 and part of how the claims were to be "presented, decided or paid" so as to qualify as a "regulatory taking." J.S. 14, 25-26. To the contrary, the deductions illegally imposed by the Treasury and subsequently embodied in the Act were not part of any regime or implementing measure and had absolutely nothing to do with any of the Tribunal's operations or the manner in which claims were presented or decided by the Tribunal or paid from the Security Account in the Netherlands. The deductions are assessed in New York.

[23] The government's effort at finding "clear error" is also confusing. It seeks to justify *Congress'* actions here in view of the "broader context of the *President's*" foreign relations authority. J.S. 13. The fact that the President *had no authority* to assess deductions against Tribunal awards was the reason Congress got involved at all. J.A. 95.

"[T]o the extent petitioner believes it has suffered an unconstitutional taking by the suspension of the claims, we see no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act." *Dames & Moore*, 453 U.S. at 689. As Justice Powell further reasoned in his concurrence:

> The [majority] opinion makes clear that some claims may not be adjudicated by the Claims Tribunal, and that others may not be paid in full. The Court holds that parties whose valid claims are not adjudicated *or not fully paid* may bring a 'taking' claim against the United States in the Court of Claims, the jurisdiction of which this Court acknowledges. The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts. *The extraordinary powers of the President and Congress upon which our decision rests cannot, in the circumstances of this case, displace the Just Compensation Clause of the Constitution.*[24]

453 U.S. at 691 (footnotes omitted) (emphasis supplied). The government's general power over the disposition of foreign claims must not be confused with the ownership

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[24] The Court thus recognized claimants' property interest in its suspended claims, and to the extent those claims are protected by the fifth amendment, then the arbitral awards are protected as well. Initially, the government argued that claimants had no property interest in any of the awards of the Tribunal. However, if the awards had been the property of the U.S. government and their payment to the U.S. nationals was in the absence of express congressional authorization, the government officials could be exposed to criminal liability under 18 U.S.C. § 641. The government subsequently conceded that "funds received from the Security Account in payment of Tribunal awards are *not* public monies . . .". R.61 at 20. *See also* J.S.App. 28a. However, in its brief here, the government has resurrected this argument by stating that the deductions may be somehow justified because they were "not exacted from funds the Appellees had in hand . . .". J.S. 25. That contention does not diminish the property interests at issue.

of those claims. The power to settle the claims does not give the government the right to take property without compensation. *Dames & Moore*, 453 U.S. at 688-90; *Gray v. U.S.*, 21 Ct. Cl. 340, 392-93 (1886); J.S.App. 10a.[25] Sperry's and other claimants' constitutionally protected right of access to the courts—the right to have their commercial claims litigated in the courts of this country—could not be arbitrarily abridged.[26] It would make a mockery of the Tribunal's establishment and the authority holding that its awards would be the "just compensation" for the suspension of claims if the government could now diminish those claims by deducting a portion for the Treasury. "There can . . . be no doubt that the compensation must be a *full* and perfect equivalent for the property taken." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893) (emphasis supplied). The court of appeals recognized this precept. "[W]hen the President has divested [claimants] of full judicial remedies in federal courts as here, the government cannot diminish the substitute compensation of the alternative forum by arbitrarily keeping a portion for itself." J.S.App. 9a.[27]

The government's efforts to charge the costs of settling the crisis—the costs of utilizing Plaintiffs' and others' claims as "bargaining chips" to resolve the hostage crisis—

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[25] The authority to enter into international agreements which may affect private interests does not thereafter insulate the government from the consequences of unconstitutional conduct in carrying out its treaty obligations. Reid v. Covert, 354 U.S. 1, 16 (1957).

[26] *See Dames & Moore*, 453 U.S. at 691. *See also* Chambers v. Baltimore & Ohio Railroad Co., 207 U.S. 142, 148 (1907) (access to the courts is a fundamental constitutional right).

[27] The federal district courts, where the majority of the "bargained" claims were pending, do not assess fees on judgments for the costs of adjudicating or settling claims. ". . . [n]o deduction is assessed in the United States district court, whose jurisdiction Sperry had a right to invoke, but it was extracted from the Tribunal award, purportedly the substitute for a court judgment." J.S.App. 10a. As to Sperry, this is important. Sperry and the Iranians settled their claims for an *agreed* amount. The U.S. district courts make no deductions against settlements reached by litigants before them.

means that the claims are "not fully paid" and thus has resulted in a taking of Sperry's property. "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).[28] Because the taking of Sperry's $42,000 was a permanent "occupation" and not a "temporary physical invasion" of Sperry's property, the Federal Circuit correctly found that the "size" of the occupation or how "minimal" the economic impact was had no relevance. J.S.App. 6a; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 and 438 n.16 (1982).[29] The court of appeals correctly found that the extent of the occupation is relevant only to determining the amount of compensation due. J.S.App. 6a; *Loretto*, 458 U.S. at 437.

Nonetheless, the government suggests the "modesty" of the exaction allows it to survive constitutional scrutiny and that the government may legislate "adversely" to economic values and need not match values of benefits and

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[28] This concept especially applies here where the property is being taken for the "public use" of achieving substantial foreign policy objectives. *Dames & Moore*, 453 U.S. at 691 n.2. *See also* E-Systems, Inc. v. United States, 2 Cl. Ct. 271, 275 (1983) ("There is no more persuasive reason why [the reasoning in *Armstrong*] should not apply in achieving a national purpose or benefit in the field of foreign policy than in the accomplishment of any other lawful national purpose or benefit").

[29] Where there is a permanent physical occupation of property, rather than a temporary invasion, there is no inquiry into the *extent* of diminution; that inquiry is only appropriate under the general multifactor test applicable to non-possessory governmental activity. J.S.App. 5a. *See Loretto*, 458 U.S. at 432, 438-440; Shanghai Power Co. v. United States, 4 Cl. Ct. 237, 242 (1983), *aff'd mem.*, 765 F.2d 159 (Fed. Cir.), *cert denied*, 474 U.S. 909 (1985). *See also* J.S.App. 9a and F.C.C. v. Florida Power Corp., 480 U.S. 245 (1987) (only where no physical occupation occurs may a court conduct a multifactor inquiry).

taxes. J.S. 15-16.[30] Congress may have a noble objective in reducing the deficit, but that objective does not support a special assessment against arbitral awards.

> [M]any of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, 'a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.'

First English Evangelical Lutheran Church v. County of Los Angeles, 107 S.Ct. 2378, 2389 (1987) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)). Congress sought here to change its policy, reach back and assess fees retroactively against Tribunal awards. These fees are part of the costs of promoting the government's foreign policy objectives and resolving an international crisis. Especially where, as here, these fees have not been even roughly drawn to approximate the costs of using the Tribunal, the deductions are not immune from constitutional scrutiny.

For this reason, the court of appeals also correctly analogized the government's taking here to the illegal exaction in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); J.S.App. 6a. There, the Court struck down a state law that appropriated all interest on funds deposited in its registry to the state, ostensibly because the funds assumed the status of "public money." However, while noting the general permissiveness in upholding governmental action in taking property to promote the general welfare, the Court held that the state government had

[30] The taxing power was not even claimed by Congress as authority for the deductions. In any event, the Court has held that the exercise of the taxing power is subject to the strictures of the fifth amendment. *See, e.g.*, Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589, n.20 (1935); Norwood v. Baker, 172 U.S. 269, 278-79 (1898).

"not merely 'adjust[ed] the benefits and burdens of economic life to promote the common good' " but that "the exaction [was] a forced contribution to general governmental revenues, and it [was] not reasonably related to the costs of using the courts." 449 U.S. at 163. Here as well, nothing in the record shows that the "exaction" was "reasonably related" to the costs of using the Tribunal. The obligation to discharge foreign policy interests is that of the government. Satisfying the attendant expenses by deductions from private arbitral awards violates that principal and renders the legislation invalid, regardless of the small percentages or individual economic impact involved.

The government's characterization of the deductions as "user fees" under various Commerce Clause cases fares no better. J.S. 16-17. Even were we to indulge the analogy in this context, the deductions still do not qualify as user fees because the amount of the fee bears *no* relationship to Sperry's activities at the Tribunal; it does not vary directly with the *use* of Tribunal and does not "even purport to approximate fairly the cost or value of the use" of the Tribunal. *American Trucking Ass'ns v. Scheiner*, 107 S.Ct. 2829, 2844 (1987). *See also Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981) (measure of tax must be reasonably related to extent of use).[31] Indeed, the government has conceded it could not even structure a deduction to satisfy the "cost-benefit" nexus required for a legitimate IOAA user fee. J.A. 170.[32] Because Sperry

[31] In Massachusetts v. United States, 435 U.S. 444 (1978), user charges resembling taxes were sustained because *every* airplane that used the navigable airspace in the United States had "available to it the navigational assistance and other special services supplied by the United States." 435 U.S. at 468 (footnote omitted). The "losers" at the Tribunal not only had the services available, but used them and incurred governmental costs. J.S.App. 42a.

[32] The requirement for such a nexus is not "an IOAA idiosyncracy" and no cases supporting "user fees" have been cited in which "the requirement of a nexus between costs and benefits has not been imposed." Florida Power & Light Co. v. United States, 846 F.2d 765, 779 n.7 (D.C. Cir. 1988) (Starr, J., dissenting).

used little of the procedures, and others used far more, and the tax does not vary with such use, it does not pass muster even under these decisions.[33]

The government also urges that because Sperry "benefited" from the Tribunal and "voluntarily invoked" its jurisdiction, it may be charged for it. First, in the takings context, the extent to which a claimant is a beneficiary of governmental action is only relevant if the claimant was the particular intended beneficiary of the action. *See National Board of YMCA v. United States*, 395 U.S. 85, 92 (1969); *Belk v. United States*, 858 F.2d 706, 709 (Fed. Cir. 1988). The intended beneficiary of the establishment of the Tribunal, whose costs are sought to be recovered, was the nation as a whole as it was established *only* as part of the resolution of the hostage crisis. *See Dames & Moore*, 453 U.S. at 687-88; J.S.App. 11a. The government completely overlooks this in its apparent insistence that the Tribunal was only established for the claimants' benefit.[34] Second, Sperry and other claimants by no means "voluntarily" invoked the Tribunal's procedures. Unless a claimant wished to forfeit a claim entirely, a claimant had

[33] Fees based on the amount of the award are more like the illegal taxes in Interstate Transit, Inc. v. Lindsey, 283 U.S. 183, 190 (1931) which were based on earning capacity of a vehicle as opposed to its use of a state's highways. *See also* Western Oil and Gas Ass'n v. Cory, 726 F.2d 1340, 1343-45 (9th Cir. 1984), *aff'd*, 471 U.S. 81 (1985) (volumetric charges are not user fees because they are not reflective of benefits conferred).

[34] Not only did Sperry have ongoing litigation and substantial attachments *before* the suspension and referral of the claims to the Tribunal, Sperry and a multitude of others opposed the government's intervention. Indeed, Sperry had claims totalling $18 million, secured by attachments for $7 million, but later, after being forced to the Tribunal, agreed to settle with the Iranians for $2.8 million. Quite differently, the claims involved in prior international settlements were not commercial claims but arose out of expropriations. For example, in *Shanghai Power*, the claimant there had absolutely no hope for any satisfaction of its claim growing out of the 1950 expropriation of its property and without the president's intervention may have had no prospect of any recovery. J.S.App. 9a; 4 Cl. Ct. at 245.

no choice but to proceed at the Tribunal, as prescribed by the Algiers Accords—a completely *in*voluntary act.[35]

The government also suggest that Sperry should have expected these fees. J.S. 26-27. If there was any intent at the time of the Accords to impose a tax or have the claimants bear the costs, then such an intent would have been expressed in the Accords, an executive order, or in enabling legislation at or near the time the Accords were negotiated or reviewed, and prior to the filing deadline at the Tribunal. However, the Accords made no mention of charges being assessed to fund the Tribunal's operation. The Accords provided that the *governments* of both Iran and the United States were to bear the costs equally, J.A. 23, the executive order provided for *full* payment of awards, App. 3a, and Congress directed the *State Department* to be responsible for funding the expenses of the Tribunal. App. 7a. Whether or not such language is seen as promissory, it is simply not logical to conclude, in this context, that claimants should have *expected* to be charged for the expenses of running the Tribunal.

As the court of appeals correctly noted, the fact that fees are assessed by the Foreign Claims Settlement Commission (FCSC) is irrelevant. J.S.App. 9a-10a. The FCSC was not part of the process of adjudicating claims of Sperry or any other large claimant and there was no reason to presume that their procedures or fees would apply.[36]

[35] This factual setting distinguishes the government's reliance on Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), where the Court found no "taking" when a corporation voluntarily submitted itself to conditions statutorily authorized in advance. *Id.* at 1006-07.

[36] Indeed, the absence of the FCSC suggests the absence of any such fees. The government nonetheless posits that although Sperry was not proceeding at the FCSC, the routine deductions against lump-sum settlements "negated any reasonable expectation" to be exempt from deductions. J.S. 27. However, it would have been equally reasonable to expect that the manner of adjudicating and settling the claims of the Japanese Americans would apply where no fees are assessed except for the Claims Court's usual filing fee, regardless of the amount of the claim and irrespective of any ultimate recovery or judgment. 50 App. U.S.C. §§ 1981, *et seq.*

Clearly, the entire rationale for imposing the fees initially was *not* that claimants knew about the fees or should have expected them, but to avoid criticism. App. 10a; *supra*. It was not until June 1982 when the first award from the Tribunal was about to be paid, that the government did anything to assess fees. At this point, Sperry, as well as other claimants, had already filed their claims in the Tribunal as required by the Accords. Treasury's illegal attempt to impose the fees then cannot be grounds now to conclude that legislating the fees is not novel.

The government also implies that the provision of an alternate forum at The Hague allowed claimants such as Sperry to overcome jurisdictional obstacles to asserting claims against the Iranians in U.S. courts under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602, *et seq.*, ("FSIA"). J.S. 23. As was made clear in the overwhelming number of challenges to the establishment of the Tribunal brought by litigants who preferred the FSIA and U.S. courts, claimants such as Sperry did not "elect" to proceed at the Tribunal in the usual sense—they were given no other choice under the terms of the Algiers Accords. If the Tribunal were the only method of recovery, then the FSIA is of no statutory significance, foreign investments are subject to the whim of our legislators and the Court's opinion in Part V of *Dames & Moore* is without basis.[37]

Here the claims arising from the foreign investments of Sperry and other claimants were used as "bargaining chips" and moved from one forum to another against their collective will. The government may not now take the

[37] With the enactment of the FSIA, the Executive's asserted authority to espouse commercial claims or otherwise interfere with the investment expectations of U.S. nationals trading internationally disappeared. Where a right to pursue a claim against a foreign government or commercial entity exists, the United States government loses its ability to settle or otherwise interfere with that claim over the objections of the claimant, without the payment of just compensation. *See generally Dames & Moore v. Regan,—Rights In Conflict: The Fifth Amendment Held Hostage*, 31 Am. U.L. Rev. 345, 364-65, 378 and 381 n.259 (1980).

award that was the "just compensation" for the suspension of pending claims and further reduce it in the manner it has chosen.

II. The Iran Claims Settlement Act Is Void Under Other Provisions Of The Constitution As Well

A. The Retroactive Application Of the Iran Claims Settlement Act Renders It Unconstitutional

The deductions authorized by the Iran Claims Settlement Act apply to all awards of successful claimants before the Tribunal, both prior to and after the legislation was passed in 1985. Congress has often legislated with respect to past events and where Congress has explicitly manifested its intent to retroactively apply the legislation's terms, the analysis proceeds to whether or not the retroactive application of the statute is constitutional. *See generally Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984). The manifest injustice in acceding to Congress' intent to apply retroactively legislation which authorizes prior taxes or administrative assessments—denominated "curative"—has depended almost exclusively on the nature of the conduct retroactively authorized and the legislative policy that preceded.[38]

The seminal decisions on the constitutionality of curative statutes are *U.S. v. Heinszen & Co.*, 206 U.S. 370 (1907) and *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922). In *Heinszen*, tariffs collected on goods imported into the Philippines had been held not to be authorized between 1899 and 1902, although they had been authorized expressly by legislation before and after those dates. Congress later enacted a statute which retroactively ratified the tariffs which had been collected between 1899 and 1902. In finding the curative legislation valid, the Court held that Congress may " 'cure irregularities, and confirm

[38] Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv.L.Rev. 692, 703 (1960); Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 Calif.L.Rev. 216, 238 (1960).

proceedings which, without the confirmation, would be void, because unauthorized, provided such confirmation does not interfere with intervening rights.' " *Heinszen*, 206 U.S. at 384 (quoting *Mattingly v. District of Columbia*, 97 U.S. 687, 690 (1878)).

In *Forbes*, the Court restricted the retroactive application of a curative statute. At issue in *Forbes* was the collection of tolls by a state governmental agency under a mistaken belief that it was authorized to collect them. The same day that the Florida Supreme Court held that the agency was not empowered to collect the tolls, the Florida legislature enacted a statute to authorize retroactively the collection of the tolls. The Court held, distinguishing this situation from that in *Heinszen*, that this retroactive legislation was unconstitutional:

> Stripped of conciliatory phrases the question is whether a state legislature can take away from a private party a right to recover money that is due when the act is passed. . . . [R]atification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act.

258 U.S. at 339 (citations omitted). Together, "*Heinszen* and *Forbes* appear to stand for the proposition that administrative, procedural, and technical defects unrelated to the underlying policy may be remedied by curative legislation, while legislative policy may not be changed retroactively." *Van Emmerik v. Janklow*, 454 U.S. 1131, 1133 (1982) (White and Blackmun, JJ., dissenting to dismissal for want of substantial federal question).

Thus, consistent with *Heinszen* and *Forbes*, to qualify for constitutional approval as "curative" of some administrative mistake, there must have been an underlying legislative policy that at some point implicitly approved the result which is later achieved retroactively, or there must have been no contrary legislative policy in effect during the time period affected by the retroactivity. Prior unauthorized administrative action cannot serve to bootstrap new legislative policy into existence earlier.[39]

Under this analysis, the Iran Claims Settlement Act is unconstitutional retroactive legislation. No legislative policy ever existed prior to the Act that implicitly or explicitly approved the idea of the claimants paying the costs of the Tribunal. Instead, the Algiers Accords provide that the respective governments, not the individual claimants, bear all the costs of the establishment and operation of the Tribunal. J.A. 23. The UNCITRAL rules provided that, unless agreed otherwise, the *losing* party be required to pay costs. The Senate also indicated its intent that the *government* assume the costs of providing personnel and resources for the Tribunal's effective operation. App. 7a. The Claims Court also found nothing to support Treasury's effort to collect fees by way of the Directive License. Because Congress never stated that it originally intended to give Treasury the authority to recover costs by percentage deductions from Tribunal awards, it was retroactively authorizing illegal deductions which were not merely technically flawed, but contrary to law and policy, thus rendering the Iran Claims Settlement Act unconstitutional.

B. The Iran Claims Settlement Act Denies Sperry Equal Protection Of The Law

The Iran Claims Settlement Act also only charges claimants like Sperry, who were successful in recovering on

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[39] Routinely allowing retroactive authorization of illegal conduct without regard to prior existing legislative policy would produce absurd results. "Are we really prepared to say that the State taxing authorities can collect an increased tax for 10, 20, 50 or 100 years without legislative sanction and then have it ratified by retroactive legislation? . . . This is not the democratic way and might well lead to another Boston Tea Party." State *ex rel.* Van Emmerik v. Janklow, 304 N.W.2d 700, 709 (S.D. 1981) (Dunn, J. dissenting), *appeal dismissed*, 454 U.S. 1131 (1982). *See also* Washington National Arena Limited Partnership v. Treasurer, Prince George's County, 287 Md. 38, 410 A.2d 1060, 1069, *cert. denied*, 449 U.S. 834 (1980).

their claims before the Tribunal, either at trial or in settlement negotiations, while not charging those who used the Tribunal but did not obtain an award. This operation denied Sperry equal protection of the laws in violation of the fifth amendment.[40]

The first step in an equal protection analysis is to define properly the class of persons who can accomplish the purpose of the legislation at issue. If this legislation is applied to a more limited class of persons than those who can accomplish its purpose, the court must demand a rational reason for burdening only a portion of the group. *Rinaldi v. Yeager*, 384 U.S. 305 (1966). The court reviewing the legislation must not accept blindly the classification made by the legislation itself as a starting point for its inquiry. In *Williams v. Vermont*, 472 U.S. 14 (1985), the Court stated:

> A State cannot deflect an equal protection challenge by observing that in light of the statutory classification all those within the burdened class are similarly situated. *The classification must reflect pre-existing differences; it cannot create neu ones that are supported by only their own bootstraps.*

Id. at 27 (emphasis supplied). The classification drawn by the Iran Claims Settlement Act does not "reflect pre-existing differences" between all of the persons using the resources of the Tribunal. A classification rationally related to the stated purpose of the legislation—cost recovery—and reflecting pre-existing differences would necessarily be the entire class of claimants before the Tribunal.[41]

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[40] Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (equal protection of the laws guaranteed under the fifth amendment's Due Process Clause).

[41] In *Rinaldi*, the Court invalidated a state statutory scheme that reimbursed the costs of providing trial transcripts to indigent appellants by charging only certain of the appellants for the transcripts. Only those indigent appellants receiving a prison paycheck were burdened with reimbursing the county for the transcript costs. Those appellants who won their appeal, or who lost their appeal and were simply fined or put on probation, were not so burdened. The Court held that this treatment was unconstitutional because there was no rational purpose for the narrow classification defined by the statute. 384 U.S. at 409.

More is required of a law "than nondiscriminatory application within the class it establishes." 384 U.S. at 308. Although legislation may impose burdens upon certain classes if there are permissible reasons, "the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.' " *Id.* at 309 (citation omitted).[42] Because the purpose for the legislation in *Rinaldi* was to reimburse the county for the costs of the transcripts provided to the indigent appellants, there was no relevance in singling out only those appellants who were unsuccessful in their appeal and incarcerated. *Id.*

Similarly here, because the purpose of the statute authorizing the deductions is purportedly to help defray the costs of operating the Tribunal, there is no relevance in singling out only those claimants who, after using the resources of the Tribunal, happen to win. In *Rinaldi*, the proper classification for the legislation would have been all indigent appellants who received free transcripts—whether successful on appeal, unsuccesful, incarcerated or fined; here, the proper classification should be all claimants who used the services of the Tribunal—whether successful in trial, successful in a negotiated settlement like Sperry, or completely unsuccessful.

The only "reason" offered for the limited classification was that charging unsuccessful claimants more than a nominal fee would "deter" them from using the Tribunal.

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[42] Recognizing the pitfalls of reviewing legislation under an equal protection analysis, the Court in *Williams* noted that a rational basis scrutiny does not mean no scrutiny at all. Although the test allows for a broad source of "reasons" for legislation, it does not allow for a "casual" reason to justify a law that burdens a limited class of persons, "particularly when a more precise and direct classification is easily drawn." 472 U.S. at 23 n.8.

J.S. 18.[43] The government, however, has not explained how such a fee could "deter" use because claimants could only be "unsuccessful" *after* use of the Tribunal. Further, use of the Tribunal was mandated by the Algiers Accords and executive orders long before any scheme of deductions was ever conceived. Here, the proper classification would have included all claimants before the Tribunal in order to be consistent with the purpose of the legislation to help defray the costs of operating the Tribunal. Accordingly, Sperry's right to equal protection of the laws was denied by application of the Act.

C. The Iran Claims Settlement Act Violates The Origination Clause

The Origination Clause of the Constitution provides that all bills for raising revenue must originate in the House of Representatives. U.S. Const. art. I, § 7, cl. 1. The Iran Claims Settlement Act runs afoul of this constitutional requirement because the Act's only purpose is to "raise revenue" and it originated in the Senate, not the House.

If the purpose of an act is to raise revenue to be applied to meet the expenses of the government or otherwise create public funds for the service of the government, the legislation "raises revenue" within the meaning of the Origination Clause. *See Millard v. Roberts*, 202 U.S. 429, 436-37 (1906); *U.S. v. Norton*, 91 U.S. 566, 569 (1876). The purpose of the Iran Claims Act is indisputably to raise revenue. The Act did not establish the Tribunal or have anything to do with processing claims there. Thus, the only purpose for the Act was to attempt to recover the costs of the Tribunal. And, the revenue so raised was not

[43] The cited portion of the hearings relied on by the government to support this "reason" is simply the State Department's responses to supplemental questions. The Executive was not disinterested in the legislation's passage; it prompted the legislation and was at the time in litigation with Sperry over this issue. Its statements at the hearings should be discounted as self-serving and, in any event, are of absolutely no significance in determining Congressional reasoning. *Kelly*, 479 U.S. at 51 n.13.

related to any other provision in the Act. This conclusion is supported not only by the facts preceding its introduction, but the legislative history as well.

For example, Senator Evans, when introducing the legislation which would eventually become the Act, stated that the Bench Ruling in Plaintiffs' favor was the critical reason for the legislation. J.A. 95. At the commencement of the hearings, Senator Evans again reminded the congressional leaders that "swift action" on the bill was necessary lest fees have to be "returned." J.A. 128. Further, the Foreign Relations Authorization Act did not contain any revenue-raising provisions when it originated in the House.[44] The section authorizing deductions originated in the Senate (S.1166) and did not amend any similar bill from the House.[45]

While the Senate may "propose and concur with amendments" to revenue bills which originate in the House of Representatives, it may not, by virtue of an amendment, originate a revenue raising measure. "It is conceded . . . that the Senate can not propose an amendment raising revenue to any bill coming from the House, but only to a bill raising revenue." 2 A. Hinds, *Precedents Of The House of Representatives Of The United States* § 1489 at 952 (1907). *Cf. Armstrong v. U.S.*, 759 F.2d 1378, 1381-82 (9th Cir. 1985) (once a revenue bill has been initiated in the House, the Senate is fully empowered to propose amendments).

The Foreign Relations Authorization Act contained no revenue raising provisions when it was passed by the

[44] Although the Foreign Relations Authorization Act does affect the Treasury by providing for the expenditures of money, it is not a revenue-raising measure. "A bill creating an office and fixing the salary of the officer affects the treasury to the extent of such salary, but is not a bill for raising revenue." 2 A. Hinds, *Precedents Of The House of Representatives* § 1489 at 952.

[45] "The Senate amendment . . . also authorizes the Secretary of the Treasury to deduct a small fee from awards to large claimants of the tribunal. . . . The House bill contains no comparable provision. . . . The conference substitute is substantially the same as the Senate provision." J.A. 120.

House, and thus could not be amended to add a revenue raising provision. In *Twin City National Bank v. Nebeker*, 167 U.S. 196 (1897), the Court upheld an amendment by the Senate which added a taxing measure to a non-revenue raising bill only because the tax was part of the whole concept of the legislation and did not raise revenue to meet governmental expenses. *Id.* at 203. In contrast, the deductions from Tribunal awards here were paid directly into the Treasury's "general fund miscellaneous receipts" (J.A. 40) to "offset the deficit" (J.A. 95) and have absolutely nothing to do with the "greater purpose" of the Foreign Relations Authorization Act or any provision of the Iran Claims Settlement Act. The deductions are therefore unconstitutional because of the Act's improper origination in the Senate.

CONCLUSION

The details of Iran's seizure and detention of the American hostages were reported daily to the public and the situation gripped our nation for well over a year. The resolution of the international crisis by the exchange of the hostages for the frozen assets and suspension of claims ended the prolonged and inhumane detention and treatment of American citizens, brought about a degree of normalization of diplomatic relations with Iran and restored national pride. The resolution of this crisis was necessary—and the process by which the crisis was settled necessarily elaborate—but the laudatory ends achieved do not justify the imposition of the costs on an arbitrary few for the benefit of the entire country. The court of appeals correctly found that charging these costs to claimants such as Sperry violated the fifth amendment.

The government has failed to show that the Court should set the matter for plenary consideration and the appeal should be dismissed. In the alternative, for lack of error in the decision below, the Court should summarily affirm.

Respectfully submitted,

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APPENDIX

APPENDIX A

Excerpts From Legislative And Administrative Materials Relating To The Establishment And Operation Of The Tribunal.

1. Excerpts From Bulletin Reprint, *Bureau Of Public Affairs*, U.S. Department Of State, Detailing Chronology Of Events In Iran During The Hostage Crisis, November 4, 1979 To January 27, 1981:

September, 1980

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September 12

Khomeini sets forth conditions on which the hostages are [sic] released:

- Late Shah's property returned;
- Cancel claims against *Iran*;
- Unblock frozen assets; and
- A promise not to intervene politically or militarily in Iran's affairs

• • •

January 1981

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January 12

Two bills are introduced by the Iranian Parliament as "emergency" legislation to speed up an agreement with the U.S. One bill would authorize arbitration of claims against Iranian assets and the other would "nationalize" the late Shah's wealth.

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January 14

Parliament approves the bill permitting arbitration of claims on Iranian assets.

2. Excerpts From Documents Accompanying Algiers Accords, As Transmitted To Congress, March 12, 1981, *reprinted in* 19 *Bureau Of Public Affairs*, U.S. Department Of State, Selected Papers At 2 (footnotes omitted) (J.A. A20)

Background Information on Negotiations

Efforts to obtain the release of the hostages in Iran began when the American Embassy in Tehran was seized on November 4, 1979. The direct steps leading to the signing of this agreement in Algiers on January 19-20, 1981, however, began on September 12, 1980, when Ayatollah Khomeini announced his four conditions for the release of the hostages. . . .

• • •

The overall agreement was entered into on the morning of January 19, 1981, and the final implementing arrangements were completed on January 20, 1981. At that point, the 52 U.S. nationals were released from Iran.

Effect of Agreement

The most immediate and obvious result of these agreements is that they effected the release of the 52 U.S. nationals who had been detained in Iran for 444 days, from November 4, 1979, to January 20, 1981.

As a result of this agreement, an Iran-U.S. Claims Tribunal will be established to arbitrate claims—in particular, the large number of claims of U.S. nationals against Iran. The tribunal will

consist of nine arbitrators unless the two governments agree on a larger multiple of three. The United States and Iran each appoint one-third of the arbitrators. The party-appointed arbitrators appoint, by agreement, the remaining third of the tribunal's members.

To implement these agreements, President Carter issued 10 Executive orders on January 19, 1981, and President Reagan issued an 11th Executive order on February 24, 1981.

3. Excerpts From Executive Order 12294 of February 24, 1981, "Suspension Of Litigation Against Iran," 46 Fed. Reg. 14111 (Feb. 26, 1981) (J.A. A27)

. . . [I]n order to implement Article II of the Declaration of Algeria concerning the settlement of claims and to begin the process of normalization of relations between the United States and Iran, it is hereby ordered that as of the effective date of this Order:

Section 1. All claims which may be presented to the Iran-United States Claims Tribunal under the terms of Article II of the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, and all claims for equitable or other judicial relief in connection with such claims, are hereby suspended, except as they may be presented to the Tribunal. During the period of this suspension, all such claims shall have no legal effect in any action now pending in any court of the United States. . . .

• • •

Section 4. A determination by the Iran-United States Claims Tribunal on the merits that a claimant is not entitled to recover on a claim shall operate as a final resolution and discharge of the claim for all purposes. *A*

determination by the Tribunal that a claimant shall have recovery on a claim in a specified amount shall operate as a final resolution and discharge of the claim for all purposes upon payment of the claimant of the full amount of the award, including any interest awarded by the Tribunal. (emphasis supplied).

4. Excerpts From Declaration Of The Government Of The Democratic And Popular Republic Of Algeria Concerning The Settlement Of Claims By The Government Of The United States Of America And The Government Of The Islamic Republic Of Iran ("Algiers Accords") *reprinted in* 19 *Bureau Of Public Affairs*, U.S. Department Of State, Selected Papers (March 12, 1981) (J.A. A22-23):

• • •

ARTICLE II

1. An International Arbitral Tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, . . .

• • •

ARTICLE III

The Tribunal shall consist of nine members or such larger multiple of three as Iran and the United States may agree are necessary to conduct its business expeditiously. Within ninety days after the entry into force of this agreement each government shall appoint one-third of the members. Within thirty days after appointment, the members so appointed shall by mutual agreement select the remaining third of the members and appoint one of the remaining third President of the Tribunal. Claims may be decided by the full Tribunal or by a panel of three members of the Tribunal as the President shall determine. Each such panel shall be composed by the President and shall consist of one member appointed by each of the three methods set forth above.

2. Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the parties or by the Tribunal to ensure that this agreement can be carried out. The UNCITRAL rules for appointing members of three-member Tribunals shall apply *mutatis mutandis* to the appointment of the Tribunal.

3. Claims of nationals of the United States and Iran that are within the scope of this agreement shall be presented to the Tribunal either by claimants themselves, or, in the case of claims of less than $250,000, by the Government of such national.

4. No claim may be filed with the Tribunal more than one year after the entry into force of this agreement or six months after the date the President is appointed, whichever is later. . . .

ARTICLE IV

1. All decisions and awards of the Tribunal shall be final and binding.

2. The President of the Tribunal shall certify, as prescribed in Paragraph 7 of the Declaration of the Government of Algeria of January 19, 1981, when all arbitral awards under this agreement have been satisfied.

3. Any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws.

ARTICLE V

The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

ARTICLE VI

1. The seat of the Tribunal shall be The Hague, The Netherlands, or any other place agreed by Iran and the United States.

2. Each government shall designate an agent at the seat of the Tribunal to represent it to the Tribunal and to receive notices or other communications directed to it or to its nationals, agencies, instrumentalities, or entities in connection with proceedings before the Tribunal.

3. *The expenses of the Tribunal shall be borne equally by the two governments.* (emphasis supplied)

• • •

ARTICLE VII

For purposes of this agreement:

• • •

2. "Claims of Nationals" . . . Claims referred to the Arbitral Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court.

• • •

5. Excerpt From S. Rep. No. 97-71, 97th Cong. 1st Sess., Report Of The Senate Committee On Foreign Relations On The Foreign Relations Authorization Act, Fiscal Years 1982 And 1983 (May 15, 1981) At 5 (J.A. A35):

• • •

It is a concern of the Committee that the Department have adequate personnel and resources to perform the political and economic reporting and analysis necessary to protect U.S. interests abroad.

In this regard, the Committee also notes that the International Arbitral Tribunal established by the United States-Iran agreements of January 19, 1981 is of vital importance to the United States, and urges the Department to devote sufficient personnel and resources to enable the United States to represent the interests of U.S. citizens before the tribunal in an effective and expeditious manner. (emphasis supplied).

The Committee expects the Department to keep it informed of the need for additional personnel and resources as it arises.

• • •

APPENDIX B

The Entire Documentary Record Purporting To Set Forth Estimates Of Costs, "Rationale" For Deductions And Reasons For Non-Publication Of The Directive License Assessing Deductions Against Awards Of The Tribunal (J.A. 37-38)

• • •

(SEAL) Department of Treasury
Washington, D.C. 20220

MEMORANDUM

Date: Jun 3 1982

To: Peter J. Wallison

From: Leonard E. Santos (LES)

Subject: Rationale for Deducting Two Percent From Iran Tribunal Awards

I understand you have asked for an explanation of the rationale for authorizing the New York Fed to deduct two percent of each award to an American claimant by the Iran-U.S. Claims Tribunal.

The two percent figure was developed by the State Department based on the following assumptions:

- Total awards in excess of $4 billion;
- A ten year life for the Tribunal and Security Account;
- Annual costs of approximately $8 million

- $2.4-$5 million	- Tribunal costs
- $1.4 million	- Office of Iranian Claims-State Department
- $ .9 million	- Probable share of fee for management of Security Account

- $ .7 million	- Miscellaneous direct and indirect costs-Treasury, Justice and State

I'll be happy to elaborate verbally on this.

(SEAL) Department of Treasury
Washington, D.C. 20220

INTER-OFFICE MEMORANDUM

Date: Jun 4 1982

For: Assistant Secretary Walker

From: Peter J. Wallison (PJW)
General Counsel

Subject: Deductions From Arbitral Awards

The first Iran-U.S. Claims Tribunal award to a U.S. claimant has been authorized for payment to the New York Federal Reserve Bank with a value date of June 7, 1982. Accordingly, it is necessary to act promptly if we are going to instruct the New York Fed to deduct two percent of each award to cover U.S.G. costs in running the claims program.

The two percent deduction is based on a projected Tribunal life of ten years and annual costs of roughly $8 million. Since we expect that the Tribunal awards in favor of U.S. claimants will be in excess of $4 billion, a two percent deduction will produce $80 million over that projected ten year period. Because the two percent deduction is based on estimates, it may be necessary to adjust the deduction should the estimates prove incorrect.

We are publishing a *Federal Register* notice of our directive license as a courtesy to interested claimants; the license is not a regulation subject to the procedural requirements of Executive Order No. 12291. Some claimants may resist even this modest deduction. Nonetheless, we believe it is entirely appropriate that the successful claimants, rather than the taxpayer, bear the cost associated with the establishment and maintenance of the Tribunal and the Security Account.

REPLY

BRIEF

(3)

Supreme Court, U.S.
FILED
FEB 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-952

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, APPELLANT

v.

SPERRY CORPORATION AND SPERRY WORLD TRADE, INC.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE APPELLANT

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

11pp

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-952

UNITED STATES OF AMERICA, APPELLANT

v.

SPERRY CORPORATION AND SPERRY WORLD TRADE, INC.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE APPELLANT

1. Appellees ask this Court to affirm summarily the court of appeals' holding that Section 502 of the Foreign Relations Authorization Act for Fiscal Years 1986 and 1987 results in a taking of property for public use without just compensation. Section 502 requires the deduction of a modest fee from awards made to United States claimants by the Iran-United States Claims Tribunal, in order to reimburse the United States Government for expenses incurred in connection with the arbitration of claims of United States nationals against Iran and the maintenance of the Security Account out of which Tribunal awards to successful United States claimants are paid. It is evident, however, that the court of appeals' ruling cannot be reconciled with the decisions of this Court, and that the decision below holding an Act of Congress unconstitutional therefore warrants plenary review by this Court.

a. Appellees' principal submission on the taking issue is that Section 502 is designed to require a few United

States citizens to pay the costs of accomplishing the foreign policy goals of the United States—costs that appellees believed should be borne by the Nation as a whole. See Mot. to Dis. or Aff. 14-19, 22-23. Contrary to appellees' contention (Mot. to Dis. or Aff. 15, 16, 22), however, their claim against Iran was not sacrificed as a "bargaining chip" to obtain the release of the hostages at the American Embassy in Tehran.

The President of course would have had the power under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701-1706 (1976 & Supp. III 1979), to transfer all frozen Iranian assets in the United States directly to Iran in order to obtain the release of the hostages, without assuring the availability of any of those assets to pay the claims of United States nationals against Iran and without furnishing any mechanism for the resolution of those claims. But the President instead negotiated an agreement with Iran that both fully protected the interests of United States claimants *and* secured the release of the hostages. Under that agreement, $1 billion of the frozen assets were placed in the Security Account to pay the meritorious claims of United States nationals and the Claims Tribunal was established at The Hague to provide a forum for the resolution of those claims, unimpeded by the various obstacles to recovery that many claimants faced in their suits against Iran in United States courts. See J.S. 4-7, 23; *Dames & Moore* v. *Regan*, 453 U.S. 654, 687 (1981). The 1½% fee imposed by Section 502—which appellees concede (Mot. to Dis. or Aff. 14, 17, 19) is "modest[]," "minimal," and a "small percentage []" of the Tribunal's awards to successful claimants—serves to reimburse the United States for some of the costs it incurred in implementing that portion of the agreement with Iran that redounded to the particular benefit of appellees and other

successful claimants. See J.S. 9. The Fifth Amendment does not require the public treasury to bear these costs of resolving and paying private claims.[1]

Appellees concede that the Constitution does not bar Congress from imposing a reasonable charge on persons who utilize specific governmental services (Mot. to Dis. or Aff. 19) and that they made "use of the Tribunal's procedures in disposing of [their] claim against Iran" (Mot. to Dis. or Aff. 6). These concessions are sufficient to support the modest user fee that was deducted from their award pursuant to Section 502.

b. Appellees contend (Mot. to Dis. or Aff. 13, 16-17, 20 n.34), however, that Congress could not "diminish" their Tribunal award, even by a mere 1½% to cover expenses, because appellees previously had a right to litigate their claim against Iran in United States courts without paying a comparable fee and because they had obtained pre-judgment attachments of Iranian assets in July 1980 to secure payment of that claim. This contention is without merit.

Appellees had no *property* interest in having any particular forum, or a cost-free forum, for the adjudication of their claim. Statutes governing jurisdiction and judicial

---

[1] This conclusion is reinforced by the fact that the claims of United States nationals against Iran had adverse consequences for the Nation as a whole, which rendered them especially amenable to regulation by the federal government. Cf. *Miller* v. *Schoene*, 276 U.S. 272 (1928); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915). This Court recognized in *Dames & Moore* that "outstanding claims by nationals of one country against the government of another country are 'sources of friction' between the two sovereigns" (453 U.S. at 679, quoting *United States* v. *Pink*, 315 U.S. 203, 225 (1942)). The agreement that the President negotiated with Iran brought about a comprehensive process for the resolution of several "sources of friction," including the pendency of claims by appellees and other United States nationals against Iran.

procedure, like those governing the assessment of taxes and fees and other regulatory measures, are subject to revision by Congress. Compare *Bowen* v. *Public Agencies Opposed To Social Security Entrapment*, 477 U.S. 41, 55 (1986); *National Railroad Passenger Corp.* v. *Atchison, T. & S.F.R.R.*, 470 U.S. 451, 465-470 (1985); *Bradley* v. *Richmond School Bd.*, 416 U.S. 696 (1974); *United States* v. *Kras*, 409 U.S. 434, 448-449 (1973). Accordingly, the court of appeals' holding that the 1½% fee deducted from appellees' Tribunal award constituted a taking of their property without just compensation because appellees would not have been charged a user fee in federal district court (see J.S. App. 8a) squarely conflicts with this Court's precedents. *A fortiori*, appellees' request that this Court summarily affirm that holding is without merit.

Similarly, appellees had no property interest, as against the United States, in their pre-judgment attachments of Iranian assets. Those attachments were obtained pursuant to a general license issued by the Treasury Department after all Iranian assets in the United States had been frozen (J.S. 3-4). Although appellees still do not acknowledge the point, this Court specifically held in *Dames & Moore* that such attachments were "revocable," "contingent," and "in every sense subordinate to the President's power under the IEEPA" (453 U.S. at 673 & n.5, 674 n.6) and that a claimant therefore "did not acquire any 'property' interest in its attachments of the sort that would support a constitutional claim for compensation" (*id.* at 674 n.6). Accordingly, the court of appeals' holding that Section 502 results in a taking of private property because appellees previously had secured attachments (see J.S. App. 7a-8a) squarely conflicts with *Dames & Moore* and, for this reason alone, a summary affirmance would be inappropriate.

c. Contrary to appellees' further assertion (Mot. to Dis. or Aff. 18-19), this Court's conclusion in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980), that a taking had occurred under the "narrow circumstances" of that case does not support the same conclusion here. The finding of a taking in *Webb's* expressly rested on the premise that the county's retention of the interest earned on the deposited funds "was *not* a fee for services," because "any services obligation to the county was paid for and satisfied by the substantial fee charged pursuant to [Fla. Stat. Ann.] § 28.24 and described specifically in that statute as a fee 'for services' by the clerk's office" (*id.* at 162 (emphasis added)). See *id.* at 164-165. Here, by contrast, the 1½% deduction mandated by Section 502 explicitly *is* a fee for services, and there is no other statute under which such a fee is separately assessed. Thus, by acknowledging the validity of a fee charged for services rendered by a judicial tribunal, *Webb's* in fact strongly supports the constitutionality of Section 502.

2. Appellees argue (Mot. to Dis. or Aff. 23-25) that Section 502 violates the Due Process Clause because it "retroactively" imposes the fee on past Tribunal awards. As appellees acknowledge (Mot. to Dis. or Aff. 23), however, the standard for determining whether retroactive economic legislation comports with the Due Process Clause is whether Congress had a rational basis for the retroactive application. See, *e.g.*, *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). Here, the statutorily authorized fee was intended to remedy certain technical defects that the Claims Court's non-final decision had identified in the user fee that had been imposed by the Secretary of the Treasury under the Independent Offices Appropriation Act (IOAA), 31

U.S.C. 9701. See J.S. 8; J.S. App. 35a-41a.[2] Such curative legislation is well within Congress's power. See, *e.g.*, *Charlotte Harbor & Northern R.R.* v. *Welles*, 260 U.S. 8, 11-12 (1922); *United States* v. *Heinszen & Co.*, 206 U.S. 370 (1907).[3]

3. Appellees also err in contending (Mot. to Dis. or Aff. 25-28) that Section 502 violates the equal protection component of the Due Process Clause because no fee is charged to unsuccessful claimants. Where, as here, heightened scrutiny is not required, " '[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' " *Bowen* v. *Gilliard*, No. 86-509 (June 25, 1987), slip op. 13, quoting *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970). Here, the legislative history unquestionably reveals a state of facts reasonably justifying imposition of a fee only on successful claimants. The State Department advised Congress that if claimants would be charged a flat fee even if they did not ultimately prevail, claimants might be discouraged from seeking to settle their claims through the Tribunal in the first place. Moreover, Congress rationally could conclude that only successful claimants actually realize a sufficiently concrete benefit from the Tribunal's work to justify assessment of the fee, and only successful claimants utilize the special payment mechanism furnished by the

[2] Congress not only has authorized Executive agencies to impose fees under the IOAA for services that benefit United States nationals, it also has repeatedly authorized the deduction of percentage fees from awards made to United States nationals in settlement of their claims against foreign sovereigns, as reimbursement to the United States for costs it incurred in settling those claims. See, *e.g.*, 22 U.S.C. 1626(b), 1641a(a), 1644g.

[3] In addition, if Congress had applied the fee only prospectively, small claimants would have borne an undue burden because Iran insisted that the Tribunal hear large claims first. *Iran Claims Legislation: Hearing Before the Senate Comm. on Foreign Relations*, 99th Cong., 1st Sess. 120 (1985).

Security Account and the Federal Reserve Bank of New York. See J.S. 17-18.

4. Appellees' final contention (Mot. to Dis. or Aff. 28-30)—that Section 502 violates the Origination Clause of the Constitution—is equally insubstantial. The Origination Clause provides: "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills" (Art. I, § 7). As this Court has explained, "the practical construction of the Constitution and the history of the origin of the constitutional provision in question proves that revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." *Twin City Bank* v. *Nebeker*, 167 U.S. 196, 202 (1897); *Millard* v. *Roberts*, 202 U.S. 429, 436-437 (1906). The purpose of the Foreign Relations Authorization Act as a whole was to authorize appropriations for the Department of State and related agencies for fiscal years 1986 and 1987. Title V of the Act (99 Stat. 437), of which Section 502 was a part, addressed several issues bearing on the adjudication of claims of United States nationals against Iran. 131 Cong. Rec. 12515-12516 (1985) (remarks of Sen. Evans). Moreover, the purpose of Section 502, even if considered alone, is to charge a fee for (and thereby defray the expenses of) particular governmental services, not to raise revenues to support the operation of the government generally. Compare *Twin City Bank* v. *Nebeker*, 167 U.S. at 203; *Millard* v. *Roberts*, 202 U.S. at 435-437.[4] Section 502 therefore

[4] The instant case was distinguished on this basis in *United States* v. *Munoz-Flores*, No. 86-5236 (9th Cir. Dec. 12, 1988), slip op. 15162-15163. The Ninth Circuit there held that the statutory authorization for a special assessment of $25 against an individual convicted of a misdemeanor (18 U.S.C. 3013(a)(1)(A) (Supp. IV 1986))

plainly does not "levy taxes in the strict sense of the word" (*Twin City Bank* v. *Nebeker*, 167 U.S. at 202), and in fact appellees elsewhere insist (Mot. to Dis. or Aff. 14) that "Congress never even purported to exercise its taxing power." Accordingly, Section 502 does not constitute a "Bill[] for raising Revenue" within the meaning of the Origination Clause.

For the foregoing reasons and those stated in the jurisdictional statement, it is respectfully submitted that probable jurisdiction should be noted.

WILLIAM C. BRYSON
Acting Solicitor General

FEBRUARY 1989

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is unconstitutional under the Origination Clause. The United States has filed a petition for rehearing en banc in *Munoz-Flores*.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/20102

JOINT

APPENDIX

(5)

Supreme Court, U.S.
FILED
MAY 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-952

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, APPELLANT

v.

SPERRY CORPORATION AND SPERRY WORLD TRADE, INC.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

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NOTICE OF APPEAL FILED SEPTEMBER 8, 1988
APPEAL DOCKETED DECEMBER 7, 1988
PROBABLE JURISDICTION NOTED FEBRUARY 21, 1989

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* The opinion of the court of appeals and the notice of appeal were attached as appendices to the jurisdictional statement and are not reproduced herein.

UNITED STATES CLAIMS COURT

Case No. 660-82 C

SPERRY CORPORATION AND SPERRY WORLD TRADE, INC.,
INDIVIDUALLY AND ON BEHALF OF
THOSE SIMILARLY SITUATED

vs.

THE UNITED STATES

RELEVANT DOCKET ENTRIES

[Filed December 17, 1982]

DATE	PROCEEDINGS
	* * * * *
3) Dec. 17, 1982	Plaintiff's motion for class action certification filed. Service by mail: DEC 17 1982. DENIED: SEE ORDER OF FEB 15 1983.
	* * * * *
10) Feb. 15, 1983	Order entered denying motion for class certification.
	* * * * *
12) Feb. 22, 1983	Defendant's answer filed.
	* * * * *

DATE	PROCEEDINGS
35) Jul. 1, 1983	Plaintiffs' second motion for class action certification filed.
	* * * * *
38) Jul. 18, 1983	Defendant's opposition to plaintiffs' second motion for class action certification filed.
39) Jul. 29, 1983	Judge's order directing the close of discovery by August 31, 1983 (with any motion pertaining to discovery to be filed or presented orally by that date), directing plaintiff to file motion for summary judgment no later than October 31, 1983, and suspending pretrial proceedings if motion for summary judgment filed, filed.
	* * * * *
43) Dec. 23, 1983	Plaintiffs' motions for summary judgment, and for class certification together with exhibits (in separate bound volume) filed.
	* * * * *
46) Feb. 29, 1984	Defendant's opposition to plaintiffs' renewed motion for class certification filed.
47) Feb. 29, 1984	Defendant's cross-motion to dismiss, or in the alternative, for summary judgment filed.
	* * * * *
49) Apr. 11, 1984	Plaintiffs' opposition to defendant's cross-motion to dismiss or for

DATE	PROCEEDINGS
	summary judgment and reply in support of plaintiffs' motions for summary judgment and class certification; and objections to defendant's cross-statement of material facts and statement of genuine issues filed.
	* * * * *
52) May 14, 1984	Defendant's reply brief filed.
	* * * * *
55) May 25, 1984	Defendant's reply to plaintiffs' opposition to defendant's cross-motion to dismiss or for summary judgment filed.
	* * * * *
77) Nov. 2, 1984	Chief Judge's order allowing defendant's motion to file affidavit, and except as provided in ¶2, suspending proceedings pending the decision of the C.A.F.C. in *Shanghai Power Co. v. U.S.* filed. Copy to parties.
78) Mar. 4, 1985	Order of the Chief Judge scheduling oral argument on the pending motions for summary judgment, etc. filed.
	* * * * *
83) May 23, 1985	Transcript of proceedings (1 volume) taken at Washington, D.C. on May 14, 1985 filed [in this, and 265-85C through 267-85C].

DATE	PROCEEDINGS
84) May 30, 1985	Transcript of proceedings (1 volume) taken at Washington, D.C. on May 1, 1985 filed.
	* * * * *
88) Jul. 25, 1985	Transcript of proceedings (1 volume) taken at Washington, D.C. on June 20, 1985 filed (in this, 265-85C thru 267-85C, and 321-85C).
	* * * * *
92) Sep. 3, 1985	Defendant's status report filed.
93) Sep. 6, 1985	Order of the Chief Judge directing plaintiff to file its opposition to defendant's suggestion of mootness no later than October 4, 1985 [11/8/85–11/25/85]; and scheduling hearing, filed.
94) Sep. 9, 1985	Transcript of proceedings (1 volume) taken at Washington, D.C. on September 4, 1985 filed (in this, 265-85C thru 267-85C, and 321-85C) filed.
95) Oct. 4, 1985	Plaintiffs' opposition to defendant's suggestion of mootness filed.
	* * * * *
99) Nov. 26, 1985	See 225-85C for order assigning this case to Judge Loren A. Smith and re: Appendix G.
	* * * * *
101) Dec. 5, 1985	Defendant's response to plaintiffs' opposition to defendant's suggestion of mootness, together with

DATE	PROCEEDINGS
	Appendix (in separate volume) filed.
	* * * * *
105) Dec. 26, 1985	Plaintiffs' reply in opposition to defendant's suggestion of mootness [by leave of the judge].
	* * * * *
108) Feb. 11, 1986	Transcript of proceedings (1 volume) taken at Washington, D.C., on January 9, 1986 filed.
	* * * * *
110) Aug. 5, 1987	Judge's opinion filed.
111) Aug. 5, 1987	Judgment entered dismissing complaint with no costs.
	* * * * *
115) Oct. 5, 1987	Plaintiffs' notice of appeal filed. Copy to defendant and C.A.F.C. [$105 fee paid]. C.A.F.C. No. 88-1009.
	* * * * *

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 88-1009

SPERRY CORPORATION

v.

UNITED STATES

RELEVANT DOCKET ENTRIES

[Filed October 7, 1987]

DATE	PROCEEDINGS AND ORDERS
October 5, 1987	Appellant filed notice of appeal in U.S. Claims Court.
	* * * * *
October 6, 1987	Rec'd. notice of appeal and crt list for appellant.
October 7, 1987	Notice of appeal for appellant, filed; Brief notice sent to parties.
	* * * * *
December 7, 1987	BRIEF FOR APPELLANT & SEPARATE JOINT APPENDIX, filed.
	* * * * *

DATE	PROCEEDINGS AND ORDERS
March 9, 1988	BRIEF FOR THE APPELLEE, filed.
March 28, 1988	REPLY BRIEF FOR THE APPELLANT, filed.
	* * * * *
June 7, 1988	Argued. (Markey, CJ, Cowen, SJ, & Mayer, J)
August 10, 1988	REVERSED AND REMANDED. (Mayer, J) "JUDGMENT ENTERED"
Aug. 15, 1988	7. Letter in re typographical error on cover page of opinion, rec'd.
August 19, 1988	8. Appellee's motion for an enlargement of time to file petition for rehearing (to & including Sept. 8, 1988), filed. (SD-8/17-M). GRANTED: 8/19/88 – to & including Sept. 7, 1988).
	* * * * *
Sept. 8, 1988	11. Notice of appeal from appellee giving notice to its appeal to the Supreme Court of the U.S. from the decision and judgment entered in this action on Aug. 10, 1988, rec'd. (SD-9/8-M).
Sept. 8, 1988	12. Appellee's motion to stay issuance of mandate until the Supreme Court of the U.S. has disposed of appellee's appeal in

DATE	PROCEEDINGS AND ORDERS
	this case, filed (SD-9/8-M). GRANTED: 9/13/88.
Oct. 5, 1988	13. Appellants' application for attorneys' fees, filed. (SD-10/5-M).
	* * * * *
Oct. 19, 1988	16. Appellee's motion for stay consideration of appellant's aplc of attorney's fees, filed. (SD-10/19-M) GRANTED: 10/26/88.
December 7, 1988	NOTICE OF FILING AN APPEAL, filed (S. Ct. No. 88-0952). S. Ct. *ORDER:* 02-21-89 that having considered the statement of jurisdiction, probable jurisdiction is noted.

APPENDIX A

IN THE UNITED STATES CLAIMS COURT

No. 660-82 C

SPERRY CORPORATION AND SPERRY WORLD TRADE, INC., INDIVIDUALLY AND ON BEHALF OF THOSE SIMILARLY SITUATED, PLAINTIFFS

v.

THE UNITED STATES, DONALD T. REGAN AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY, AND ANTHONY M. SOLOMON, AS PRESIDENT OF THE FEDERAL RESERVE BANK OF NEW YORK, DEFENDANTS

CLASS ACTION COMPLAINT

1. This is a class action brought by Plaintiffs to obtain a refund of monies illegally exacted by the Defendants from Plaintiffs and the other members of the class, to declare invalid the Directive License issued by the United States Department of the Treasury allegedly authorizing this exaction and to enjoin the Federal Reserve Bank of New York from continuing this exaction under the Treasury's Directive License.

JURISDICTION

2. The jurisdiction of this Court is founded upon the Tucker Act, 28 U.S.C. § 1491 and 5 U.S.C. § 702, and arises under the Fifth Amendment to the United States

Constitution and the Independent Offices Appropriations Act 31 U.S.C. § 9701 (formerly 31 U.S.C. § 483a).

PARTIES

3. Sperry Corporation ("Sperry") is a corporation organized and existing under the laws of the State of Delaware and has its principal place of business at 1290 Avenue of the Americas, New York, New York 10019.

4. Sperry World Trade, Inc. ("SWT"), is a corporation organized and existing under the laws of the State of Delaware and a wholly owned subsidiary of Sperry Corporation. SWT has its principal place of business at 1290 Avenue of the Americas, New York, New York 10019.

5. Defendant Donald T. Regan, is the Secretary of the United States Department of The Treasury ("Treasury"), which is an agency and instrumentality of the United States government and is located at Fifteenth Street and Pennsylvania Avenue, N.W., Washington, D.C. 20220.

6. Defendant Anthony M. Solomon is the President of the Federal Reserve Bank of New York ("FRBNY"), which is an agency and instrumentality of the United States government and is located at 33 Liberty Street, New York, New York 10045.

CLASS ACTION ALLEGATIONS

7. This action is properly maintained as a class action within Rule 23(a) and (b), subdivisions (1)(a), (2) and (3) of the Rules of the United States Claims Court.

8. The class is composed of all individuals and entities who have had claims against Iran and Iranian instrumentalities pending before the Iran-United States Claims Tribunal and who have received funds or an award in payment or settlement of their claims reduced by a two percent deduction paid to the Treasury (the "Class"). This

action is to obtain a refund of these amounts improperly deducted from the Class members' settlements or awards by the FRBNY under the authority of the Treasury's Directive License.

9. The class consists of eleven members as of the date of filing this Complaint. The class is continually expanding as the claims before the Tribunal are reduced to an award and the payments forwarded to the appropriate claimants are reduced by Treasury's two percent fee. There are approximately 650 additional claims pending before the Tribunal and the Class will expand to include most, if not all of these claimants as their claims are reduced to an award.

10. The class is therefore so numerous that joinder of the class members would be impractical. The current eleven members are widely dispersed geographically and, as the class expands, will become so numerous that joinder will become even more impractical.

11. The questions of law and fact common to the class are:

(a) Whether the Directive License issued by the Treasury is illegal and void as a taking in violation of the Fifth Amendment to the United States Constitution;

(b) Whether the Directive License issued by the Treasury is illegal and void as violative of Executive Order No. 12294, Section 4;

(c) Whether the Directive License issued by the Treasury is illegal and void as violative of the Independent Offices Appropriation Act, 31 U.S.C. § 9701;

(d) Whether the Directive License issued by the Treasury is illegal and void because Treasury did not follow proper procedures in promulgating the License;

(e) Whether the Directive License issued by the Treasury is illegal and void because the Treasury has not based the License upon any value rendered to the Class members;
(f) Whether the Plaintiffs and other Class members are entitled to a refund of the amounts deducted from the awards received from the Tribunal;
(g) Whether Plaintiffs and other class members are entitled to the appropriate declaratory and injunctive relief;
(h) Whether Defendants should be enjoined from further deducting amounts from future awards by the Tribunal.

12. Plaintiffs' claims are typical of the Class claims as all arise out of Defendants' illegal conduct in issuing the Directive License and deducting the two percent fee from all awards to members of the Class.

13. Plaintiffs will fairly and adequately protect the interests of the Class in that the Plaintiffs' claims arose out of precisely the same conduct as the Class claims and therefore Plaintiffs have no interests adverse to the Class. Plaintiffs will vigorously prosecute this action.

14. Separate actions by individual members of the class would create a risk of inconsistent or varying adjudications. A single action on behalf of the Class will determine, in one proceeding, the illegality of Defendants' conduct and the class members' entitlement both to a refund and the appropriate declaratory and equitable relief.

15. Defendants have charged the two percent fee against all awards by the Tribunal in a manner therefore generally applicable to the Class as a whole. All awards from the Tribunal are reduced by the same two percent under the alleged authority of the same Directive License.

16. The questions of law and fact common to the class relating to the illegality of the License and the right to a

refund predominate over the only individual question affecting the members, the amount of the refund. This amount is liquidated and can be easily determined from the records of the Defendants and the Class members.

17. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. This Court has jurisdiction over all monetary claims against the United States and may grant the appropriate injunctive and declaratory relief in actions within its jurisdiction. The action would not be unmanageable.

CAUSE OF ACTION

COUNT I

18. On July 1, 1980, Sperry and SWT, filed a Complaint in the United States District Court for the District of Columbia against the Islamic Republic of Iran and fifteen of its instrumentalities (collectively the "Iranians"). *Sperry Co. et al. v. Islamic Republic of Iran, et al.*, Civil No. 80-1614 (D.D.C.). Sperry had various contracts with the Iranians prior to the revolution and as a result of those hostilities suffered damages in the approximate amount of $18 million for, *inter alia,* breach of contract, conversion of property, tortious takings and tortious interference with contracts arising from the events occurring during the Islamic revolution in Iran.

19. On October 24, 1980, Sperry obtained an order of prejudgment attachment from the District Court on Iranian property in this country valued at approximately $7,000,000 to secure its claims against the Iranians.

20. On January 19, 1981, after negotiations through Algeria as an intermediary, the United States and Iran entered into a series of agreements, the Algiers Accords, intended to terminate the international crisis by providing for the release of the fifty-two American hostages held by

Iran in return for the United States' obligation to: (1) terminate all legal proceedings against the Iranians in the United States courts; (2) nullify all attachments against Iran; and (3) transfer the assets formerly attached or frozen out of the country.

21. The Algiers Accords and the Executive Orders and regulations implementing the Accords were challenged in various federal District Courts, but subsequently upheld by the Supreme Court in *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

22. The Algiers Accords also established the Iran-United States Claims Tribunal to determine the rights of the litigants whose claims had been suspended. The Tribunal was initially funded with $1 billion of Iranian assets which were part of the attached assets transferred out of this country under the Algiers Accords.

23. As a result of these events, Sperry's prejudgment attachment was nullified and its claims against the Iranians pending in the United States District Court for the District of Columbia were suspended. Sperry thereafter filed its claims against Iran before the Iran-United States Claims Tribunal for arbitration as provided in the Algiers Accords. Sperry simultaneously engaged in extensive settlement negotiations with the Iranian defendants and on July 8, 1982, Sperry settled its claims against the Iranians for the sum of $2.8 million.

24. Pursuant to this settlement agreement, the Tribunal awarded Sperry $2.8 million on September 14, 1982, as amended on September 22, 1982, as an "Award on Agreed Terms". The funds to be paid Sperry were transferred from the Iranian Security Account, escrowed in the Central Bank of the Netherlands, to the Federal Reserve Bank of New York for payment to Sperry.

25. On October 29, 1982 pursuant to the Treasury's Directive License, the FRBNY deducted two percent of

this award, or fifty six thousand dollars ($56,000), from the amounts to be forwarded to Sperry, and deposited the same to the account of the Treasury. Sperry received the balance of its award, two million seven hundred and forty four dollars ($2,744,000) that same date as a deposit in its account at Chase Manhattan Bank, New York.

26. This 2% deduction was pursuant to a Directive License issued by Defendant Treasury on June 7, 1982, 47 Fed. Reg. 25243 (June 10, 1982) requiring Defendant FRBNY to deduct two percent from each arbitral award of the Tribunal, and to pay the balance of each award to the appropriate U.S. claimants. The two percent deduction was paid to the Treasury Department's general fund allegedly to reimburse the United States for the costs of implementing the Algiers Accords and for processing the arbitral awards of American claimants.

27. Sperry protested the two percent deduction by letter to Treasury Secretary Donald T. Regan, dated October 1, 1982. Defendant Treasury rejected Sperry's protest by letter dated November 16, 1982, asserting that the deduction was authorized by, *inter alia,* the Independent Offices Appropriations Act ("IOAA") 31 U.S.C. § 9701 (formerly 31 U.S.C. § 483(a)).

28. The costs of implementing the Algiers Accords and supporting the Iran-United States Tribunal were incurred by the United State to advance its foreign policy objectives. Such expenses were not incurred for the special benefit of United States nationals with claims against Iran, and are therefore not reimbursable expenses under the IOAA. Accordingly, the Directive License issued pursuant to the IOAA is illegal and void.

29. Sperry and the other members of the Class have had two percent illegally deducted from each of their awards by the Treasury, FRBNY and their officers, pursuant to Treasury's Directive License.

30. Sperry and the other members of the Class are therefore entitled to a refund of all funds illegally deducted by the Defendants, plus interest and costs.

COUNT II

31. Plaintiffs repeat and reallege paragraphs 1-29 and incorporate them by reference as though fully set forth herein.

32. Officers and agencies of the United States Government seeking to impose fees pursuant to the IOAA must do so by regulation. The Treasury has not promulgated regulations authorizing the fee in issue, as required by the IOAA and, accordingly, such Directive License is illegal and void.

33. Sperry and the other members of the Class are therefore entitled to a refund of all funds illegally deducted by the Defendants plus interest and costs.

COUNT III

34. Plaintiffs repeat and reallege paragraphs 1-32 and incorporate them by reference as though fully set forth herein.

35. The IOAA authorizes executive agencies to obtain reimbursement from the recipients of certain government services. In exercising this authority, agencies can only assess fees that bear a reasonable relationship to the value of the government services to their recipients.

36. The Treasury has violated this standard by assessing a flat two percent against all arbitral awards, regardless of both the size of the award and the extent to which the services of the Tribunal were utilized by each claimant.

37. Plaintiffs and other class members submitted to the Tribunal's jurisdiction only because they were compelled to do so to protect their claims. Plaintiffs' and other

class members claims were suspended and their valid actions pending in the Courts of the United States were terminated by the President in pursuit of foreign policy objectives. As a result, the claimants' judicial remedies were extinguished to their prejudice.

38. Plaintiffs and other members of the class settled their claims against Iran by their own efforts, and made no use of the Tribunal's adjudication services. The Tribunal performed the substantially ministerial tasks of approving the settlements negotiated by Sperry and the class members and in awarding the agreed upon amounts from the security account. The Tribunal expended minimal effort or service on Sperry's and the other Class members' behalf.

39. Sperry and other members of the Class are therefore entitled to a refund of all funds deducted by Defendants from their awards or, in the alternative, a refund of funds to the extent that the deductions exceeded the value of services provided by the government to Sperry and the Class members, plus interest and costs.

COUNT IV

40. Plaintiffs repeat and reallege paragraphs 1-38 and incorporate them by reference as though fully set forth herein.

41. The Directive License states that in addition to the IOAA, the license was authorized by various Executive Orders and agreements among the N.V. Settlement Bank of the Netherlands, Banque Centrale d'Algerie, Bank Markazi Iran and FRBNY. None of these orders and agreements authorize the Directive License.

42. Defendants' deductions from the arbitral awards of American claimants therefore offend the Fifth Amendment of the Constitution and are inconsistent with Execu-

tive Order 12294 requiring full payment to claimants of any award by the Tribunal.

43. Plaintiffs and the other members of the class are therefore entitled to a refund of all funds illegally deducted or extracted by the Defendants, plus interest and costs.

WHEREFORE, Plaintiffs pray judgment that

I. The Court determine that this action be maintained as a class action pursuant to Rule 23 of the rules of the United States Claims Court and designate Sperry the representative of the Class.

II. The Court declare the Directive License issued by Defendant Treasury on June 7, 1982, illegal and void;

III. The Defendants be jointly and severally directed to account and pay to the Class the funds wrongfully exacted and withheld as alleged herein;

IV. The Defendants be jointly and severally enjoined from continuing to deduct and withhold the funds from awards to the remaining claimants before the Tribunal;

V. The Court award Plaintiffs reasonable attorneys' fees and expenses, interest, costs and the disbursements of this action; and

VI. The Court award such other, further, different or equitable relief as the Court deems just.

DATED: Washington, D.C.
December 17, 1982

By Their Attorneys

Alan Raywid
Attorney of Record
John D. Seiver
COLE, RAYWID & BRAVERMAN
1919 Pennsylvania Avenue, N.W., Suite 200
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(202) 659-9750

APPENDIX B

IRAN-UNITED STATES CLAIMS TRIBUNAL

No. 205
CHAMBER TWO
AWARD NO. 10-205-2

SPERRY CORPORATION;
SPERRY WORLD TRADE, INC., CLAIMANT

and

THE HIGH STATE COUNCIL OF INFORMATICS OF
THE ISLAMIC REPUBLIC OF IRAN, RESPONDENTS

AWARD ON AGREED TERMS

The Tribunal has satisfied itself that it has jurisdiction in this matter within the terms of the Declaration of the Democratic and Popular Republic of Algeria concerning the settlement of Claims by the Government of the United States of America and the Islamic Republic of Iran dated 19 January 1981.

The Claimant, SPERRY CORPORATION and SPERRY WORLD TRADE INC., and the Respondent, THE HIGH STATE COUNCIL OF INFORMATICS of the ISLAMIC REPUBLIC OF IRAN, entered into a Settlement Agreement on 8 July 1982, which has been filed with the Tribunal, resolving the matters in dispute between them, whereby it is agreed that the Respondent is indebted to the Claimant in the sum of $2,800,000.00.

The Parties have filed with the Tribunal a request, signed by both Claimant and Respondent, that an Award on agreed terms be rendered which will record and give effect to the settlement pursuant to Article 34 (1) of the Provisional Rules of the Tribunal.

For the foregoing reasons,
THE TRIBUNAL AWARDS AS FOLLOWS:

The Settlement is hereby accepted and recorded as an Award on agreed terms, binding on both parties, and consequently the Respondent, THE HIGH STATE COUNCIL OF INFORMATICS OF THE ISLAMIC REPUBLIC OF IRAN, is obligated to pay the Claimant, SPERRY CORPORATION and SPERRY WORLD TRADE INC., the sum of Two Million Eight Hundred Thousand United States Dollars ($2,800,000.00), which obligation shall be satisfied by payment out of the Security Account, established pursuant to paragraph 7 of the Declaration of the Democratic and Popular Republic of Algeria of 19 January 1981.

This Award is hereby submitted to the President of the Tribunal for notification to the Escrow Agent.

Dated, The Hague
14 September 1982

/s/ PIERRE BELLET
Pierre Bellet
Chairman
Chamber Two

In the name of God

/s/ SHAFIE SHAFEIEI
Shafie Shafeiei

/s/ GEORGE H. ALDRICH
George H. Aldrich

IRAN-UNITED STATES CLAIMS TRIBUNAL

CASE NO. 205
CHAMBER TWO
AWARD NO. 10-205-2

SPERRY CORPORATION;
SPERRY WORLD TRADE, INC., CLAIMANT

and

THE HIGH STATE COUNCIL OF INFORMATICS OF
THE ISLAMIC REPUBLIC OF IRAN, RESPONDENT

CORRECTION TO AWARD ON AGREED TERMS

Pursuant to Article 36 of the Provisional Rules of the Tribunal, the following correction is hereby made to the Award on Agreed Terms herein dated 14 September 1982:

On page 2 of the Award after the words "Two Million Eight Hundred Thousand United States Dollars ($2,800,000.00)," there shall be added the words "such sum to be payable jointly to the named Claimant Corporations,".

The Registry is directed to attach a copy of this correction to each of the filed originals of the Award.

Dated, The Hague
22 September 1982

/s/ PIERRE BELLET
Pierre Bellet

In the name of God

/s/ SHAFIE SHAFEIEI
Shafie Shafeiei

/s/ GEORGE H. ALDRICH
George H. Aldrich

APPENDIX C

UNITED STATES DEPARTMENT OF STATE
BUREAU OF PUBLIC AFFAIRS
WASHINGTON, D.C.

MARCH 12, 1981

HOSTAGE AGREEMENTS TRANSMITTED TO CONGRESS

After 444 days in captivity, the U.S. hostages in Iran were finally freed on January 20, 1981. Their release came after weeks of around-the-clock discussions between the U.S. team and Algerian team, selected by the Iranian Government to act as intermediary in exchanges leading to the hostage release. The agreements which eventually concluded the Iranian crisis were adhered to at Algiers on January 19-20, 1981 with Deputy Secretary of State Warren M. Christopher signing for the United States. These agreements were transmitted to Congress by the Department of State on March 12, 1981, along with an explanatory statement summarizing the five documents.

DEPARTMENT STATEMENT REGARDING DECLARATIONS OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA, THE UNDERTAKINGS OF THE UNITED STATES AND RELATED DOCUMENTS ADHERED TO AT ALGIERS, JANUARY 19-20, 1981

Explanation of Agreement

This agreement relates to the release of 52 U.S. nationals detained in Iran and to the settlement of claims

between the United States and its nationals and the Islamic Republic of Iran and its nationals. The agreement consists of five principal documents:

(1) The Declaration of the Government of the Democratic and Popular Republic of Algeria (henceforth the "Algerian declaration").

(2) The Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (henceforth the "claims settlement agreement").

(3) The Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran With Respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria (henceforth the "undertakings").

(4) The Escrow Agreement.

(5) The Technical Arrangement Between Banque Centrale D'Algerie as Escrow Agent and the Governor and Company of the Bank of England and the Federal Reserve Bank of New York as Fiscal Agent of the United States (henceforth the "technical arrangement").

The **Algerian declaration** describes the overall principles underlying these agreements. It states that it is the policy of the United States not to intervene in the internal affairs of Iran, and it establishes a mechanism for the equitable settlement of claims between the United States and its nationals and Iran and its nationals. The declaration further establishes a procedure for the return to Iran of its assets currently held in the United States or by entities under U.S. control. The declaration finally describes the measures the United States will take with respect to assets of the estate of the former Shah of Iran and his close relatives.

The **claims-settlement agreement** establishes the Iran-U.S. Claims Tribunal for the purpose of deciding

(1) claims of U.S. nationals against Iran, (2) claims of Iranian nationals against the United States, and (3) certain claims of the United States and Iran against each other. The agreement provides a method for selecting the members of the tribunal. It also provides that all decisions and awards of the tribunal shall be final and binding and enforceable in the courts of any country.

The **undertakings** provide for the transfer of certain Iranian assets to a bank account in the name of the Banque Centrale D'Algerie and provide that when the balance in that account reaches at least $7.955 billion that Iran shall effect the safe departure of the 52 U.S. nationals detained in Iran. The undertakings provide for distribution of the funds in that account upon certification by Algeria that the 52 Americans have safely left Iran. A total of $3.667 billion has been transferred to the Federal Reserve Bank of New York to pay outstanding loans; $1.418 billion remain in an escrow account to pay outstanding loans as to which the amount owing may be in dispute; and the remainder in the account has been transferred to Bank Markazi Iran.

The **escrow agreement** implements the Algerian declaration and establishes an escrow account at the Bank of England in the name of the Banque Centrale D'Algerie as escrow agent.

The **technical arrangement** is a banking document which defines the responsibilities of the Bank of England with respect to the escrow agreement and provides for the transfer of funds pursuant to the other agreements.

Background Information on Negotiations

Efforts to obtain the release of the hostages in Iran began when the American Embassy in Tehran was seized on November 4, 1979. The direct steps leading to the signing of this agreement in Algiers on January 19-20, 1981,

however, began on September 12, 1980, when Ayatollah Khomeini announced his four conditions for the release of the hostages. Shortly thereafter, the Iranian Parliament (Majlis) established a commission to draft a detailed statement of Iran's position on the hostage issue.

The Majlis, on November 2, 1980, approved a more detailed statement of conditions for release of the hostages and delegated to the executive branch the authority to implement these conditions. The Prime Minister chose to negotiate the issue through the Algerian Government as intermediary between Iran and the United States. Eight days later, on November 10, the first U.S. response to the Majlis resolution was delivered and explained to the Algerian negotiating team in Algiers.

On November 26, 1980, the Algerian team delivered a series of Iranian comments on the U.S. position; the U.S. response to these comments and requests for clarification was delivered to Tehran on December 4, 1980.

The Iranians presented their response to the U.S. clarifications to the Algerians on December 19, 1980; the Algerian team conducted discussions with U.S. officials in Washington from December 27-30, 1980. The U.S. response to that communication was delivered to Iran on January 3, 1981. Four days later, on January 7, 1981, a U.S. negotiating team, headed by Deputy Secretary of State Warren M. Christopher, arrived in Algiers to facilitate further exchanges. Negotiations continued between the U.S. team in Algiers and the Algerian team which was shuttling between Tehran and Algiers.

The overall agreement was entered into on the morning of January 19, 1981, and the final implementing arrangements were completed on January 20, 1981. At that point, the 52 U.S. nationals were released from Iran.

Effect of Agreement

The most immediate and obvious result of these agreements is that they effected the release of the 52 U.S. nationals who had been detained in Iran for 444 days, from November 4, 1979, to January 20, 1981.

As a result of this agreement, an Iran-U.S. Claims Tribunal will be established to arbitrate claims—in particular, the large number of claims of U.S. nationals against Iran. The tribunal will consist of nine arbitrators unless the two governments agree on a larger multiple of three. The United States and Iran each appoint one-third of the arbitrators. The party-appointed arbitrators appoint, by agreement, the remaining third of the tribunal's members.

To implement these agreements, President Carter issued 10 Executive orders* on January 19, 1981, and President Reagan issued an 11th Executive order** on February 24, 1981.

In addition to directing the establishment of the escrow account described in the agreements (Executive Order 12276), President Carter also directed appropriate transfers of assets in the United States and assets held in U.S. banks overseas belonging to the Iranian Government (Executive Orders 12277-12281). President Carter revoked the trade embargo against Iran (Executive Order 12282) and placed restrictions upon transfer of property belonging to

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* President Carter's Executive Orders 12276-12285 were published in the Weekly Compilation of Presidential Documents, January 20, 1981, pp. 3027-3041. They were reprinted in the February 1981 Department of State BULLETIN.

** President Reagan's Executive Order 12294 was published in the Weekly Compilation of Presidential Documents, March 2, 1981, pp. 188-189. It will be reprinted in the April 1981 Department of State BULLETIN.

the former Shah of Iran (Executive Order 12284). A commission was established to study the issue of compensation for the U.S. nationals held in Iran (Executive Order 12285). President Carter additionally ordered the Secretary of the Treasury to promulgate regulations prohibiting claims against Iran relating to the seizure of the hostages and their subsequent detention (Executive Order 12283).

President Reagan issued Executive Order 12294 on February 24, 1981, suspending claims against Iran that may be presented to the tribunal and providing that during the period of this suspension such claims shall have no legal effect in any action now pending in U.S. courts.

Legal Authority

(1) U.S. Constitution, Article II, Section 2 (Executive Power) and (2) International Emergency Economic Powers Act (IEEPA) Section 202(a), 50 U.S.C. 1701(a).

DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA

The Government of the Democratic and Popular Republic of Algeria, having been requested by the Governments of the Islamic Republic of Iran and the United States of America to serve as an intermediary in seeking a mutually acceptable resolution of the crisis in their relations arising out of the detention of the 52 United States nationals in Iran, has consulted extensively with the two governments as to the commitments which each is willing to make in order to resolve the crisis within the framework of the four points stated in the resolution of November 2, 1980, of the Islamic Consultative Assembly of Iran. On the basis of formal adherences received from Iran and the United States, the Government of Algeria now declares that the following interdependent commitments have been made by the two governments:

GENERAL PRINCIPLES

The undertakings reflected in this Declaration are based on the following general principles:

A. Within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, the United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979. In this context, the United States commits itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction, as set forth in Paragraphs 4-9.

B. It is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. Through the procedure provided in the Declaration, relating to the Claims Settlement Agreement, the United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.

Point I: Non-Intervention in Iranian Affairs

1. The United States pledges that it is and from now on will be the policy of the United States not to intervene, directly or indirectly, politically or militarily, in Iran's internal affairs.

Points II and III: Return of Iranian Assets and Settlement of U.S. Claims

2. Iran and the United States (hereinafter "the parties") will immediately select a mutually agreeable central bank (hereinafter "the Central Bank") to act, under the instructions of the Government of Algeria and the Central Bank of Algeria (hereinafter "the Algerian Central Bank") as depositary of the escrow and security funds hereinafter prescribed and will promptly enter into depositary arrangements with the Central Bank in accordance with the terms of this declaration. All funds placed in escrow with the Central Bank pursuant to this declaration shall be held in an account in the name of the Algerian Central Bank. Certain procedures for implementing the obligations set forth in this Declaration and in the Declaration of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the Government of the United States and the Government of the Islamic Republic of Iran (hereinafter "the Claims Settlement Agreement") are separately set forth in certain Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Democratic and Popular Republic of Algeria.

3. The depositary arrangements shall provide that, in the event that the Government of Algeria certifies to the Algerian Central Bank that the 52 U.S. nationals have safely departed from Iran, the Algerian Central Bank will thereupon instruct the Central Bank to transfer immediately all monies or other assets in escrow with the Central Bank pursuant to this declaration, provided that at any time prior to the making of such certification by the Government of Algeria, each of the two parties, Iran and the United States, shall have the right on seventy-two hours notice to terminate its commitments under this declaration.

If such notice is given by the United States and the foregoing certification is made by the Government of Algeria within the seventy-two hour period of notice, the Algerian Central Bank will thereupon instruct the Central Bank to transfer such monies and assets. If the seventy-two hour period of notice by the United States expires without such a certification having been made, or if the notice of termination is delivered by Iran, the Algerian Central Bank will thereupon instruct the Central Bank to return all such monies and assets to the United States, and thereafter the commitments reflected in this declaration shall be of no further force and effect.

ASSETS IN THE FEDERAL RESERVE BANK

4. Commencing upon completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank of all gold bullion which is owned by Iran and which is in the custody of the Federal Reserve Bank of New York, together with all other Iranian assets (or the cash equivalent thereof) in the custody of the Federal Reserve Bank of New York, to be held by the Central Bank in escrow until such time as their transfer or return is required by Paragraph 3 above.

ASSETS IN FOREIGN BRANCHES OF U.S. BANKS

5. Commencing upon the completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank, to the account of the Algerian Central Bank, of all Iranian deposits and securities which on or after November 14, 1979, stood upon the books of overseas banking offices of U.S. banks, together with interest thereon through December 31, 1980, to be held by the Central Bank, to the

account of the Algerian Central Bank, in escrow until such time as their transfer or return is required in accordance with Paragraph 3 of this Declaration.

ASSETS IN U.S. BRANCHES OF U.S. BANKS

6. Commencing with the adherence by Iran and the United States to this declaration and the claims settlement agreement attached hereto, and following the conclusion of arrangements with the Central Bank for the establishment of the interest-bearing security account specified in that agreement and Paragraph 7 below, which arrangements will be concluded within 30 days from the date of this Declaration, the United States will act to bring about the transfer to the Central Bank, within six months from such date, of all Iranian deposits and securities in U.S. banking institutions in the United States, together with interest thereon, to be held by the Central Bank in escrow until such time as their transfer or return is required by Paragraph 3.

7. As funds are received by the Central Bank pursuant to Paragraph 6 above, the Algerian Central Bank shall direct the Central Bank to (1) transfer one-half of each such receipt to Iran and (2) place the other half in a special interest-bearing security account in the Central Bank, until the balance in the security account has reached the level of $1 billion. After the $1 billion balance has been achieved, the Algerian Central Bank shall direct all funds received pursuant to Paragraph 6 to be transferred to Iran. All funds in the security account are to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the claims settlement agreement. Whenever the Central Bank shall thereafter notify Iran that the balance in the security account has fallen below $500 million, Iran shall promptly make new

deposits sufficient to maintain a minimum balance of $500 million in the account. The account shall be so maintained until the President of the Arbitral Tribunal established pursuant to the claims settlement agreement has certified to the Central Bank of Algeria that all arbitral awards against Iran have been satisfied in accordance with the claims settlement agreement, at which point any amount remaining in the security account shall be transferred to Iran.

OTHER ASSETS IN THE U.S. AND ABROAD

8. Commencing with the adherence of Iran and the United States to this declaration and the attached claims settlement agreement and the conclusion of arrangements for the establishment of the security account, which arrangements will be concluded within 30 days from the date of this Declaration, the United States will act to bring about the transfer to the Central Bank of all Iranian financial assets (meaning funds or securities) which are located in the United States and abroad, apart from those assets referred to in Paragraph 5 and 6 above, to be held by the Central Bank in escrow until their transfer or return is required by Paragraph 3 above.

9. Commencing with the adherence by Iran and the United States to this declaration and the attached claims settlement agreement and the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad and which are not within the scope of the preceding paragraphs.

10. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the

United States will revoke all trade sanctions which were directed against Iran in the period November 4, 1979, to date.

11. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will promptly withdraw all claims now pending against Iran before the International Court of Justice and will thereafter bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events occurring before the date of this declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to United States property or property of the United States nationals within the United States Embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran. The United States will also bar and preclude the prosecution against Iran in the courts of the United States of any pending or future claim asserted by persons other than the United States nationals arising out of the events specified in the preceding sentence.

Point IV: Return of the Assets of the Family of the Former Shah

12. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will freeze, and prohibit any transfer of, property and assets in the United States within the control of the estate of the former Shah or of any close relative of the former Shah served as a defendant in U.S. litigation brought by Iran to recover such property and assets as belonging to Iran. As to any such defendant, including the

estate of the former Shah, the freeze order will remain in effect until such litigation is finally terminated. Violation of the freeze order shall be subject to the civil and criminal penalties prescribed by U.S. law.

13. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will order all persons within U.S. jurisdiction to report to the U.S. Treasury within 30 days, for transmission to Iran, all information known to them, as of November 3, 1979, and as of the date of the order, with respect to the property and assets referred to in Paragraph 12. Violation of the requirement will be subject to the civil and criminal penalties prescribed by U.S. law.

14. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will make known, to all appropriate U.S. courts, that in any litigation of the kind described in Paragraph 12 above the claims of Iran should not be considered legally barred either by sovereign immunity principles or by the act of state doctrine and that Iranian decrees and judgments relating to such assets should be enforced by such courts in accordance with United States law.

15. As to any judgment of a U.S. court which calls for the transfer of any property or assets to Iran, the United States hereby guarantees the enforcement of the final judgment to the extent that the property or assets exist within the United States.

16. If any dispute arises between the parties as to whether the United States has fulfilled any obligation imposed upon it by Paragraphs 12-15, inclusive, Iran may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the claims settlement agreement. If the tribunal determines that Iran has suffered a loss as a result of a failure by the

United States to fulfill such obligation, it shall make an appropriate award in favor of Iran which may be enforced by Iran in the courts of any nation in accordance with its laws.

SETTLEMENT OF DISPUTES

17. If any other dispute arises between the parties as to the interpretation or performance of any provision of this declaration, either party may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the claims settlement agreement. Any decision of the tribunal with respect to such dispute, including any award of damages to compensate for a loss resulting from a breach of this declaration or the claims settlement agreement, may be enforced by the prevailing party in the courts of any nation in accordance with its laws.

Initialed on January 19, 1981

by Warren M. Christopher
Deputy Secretary of State
of the Government of the United States
By virtue of the powers vested in him by his Government
as deposited with the Government of Algeria

DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA CONCERNING THE SETTLEMENT OF CLAIMS BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN

The Government of the Democratic and Popular Republic of Algeria, on the basis of formal notice of adherence received from the Government of the Islamic Republic of Iran and the Government of the United States

of America, now declares that Iran and the United States have agreed as follows:

ARTICLE I

Iran and the United States will promote the settlement of the claims described in Article II by the parties directly concerned. Any such claims not settled within six months from the date of entry into force of this agreement shall be submitted to binding third-party arbitration in accordance with the terms of this agreement. The aforementioned six months' period may be extended once by three months at the request of either party.

ARTICLE II

1. An International Arbitral Tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding claims described in Paragraph 11 of the Declaration of the Government of Algeria of January 19, 1981, and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position.

2. The Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services.

3. The Tribunal shall have jurisdiction, as specified in Paragraphs 16-17 of the Declaration of the Government of Algeria of January 19, 1981 over any dispute as to the interpretation or performance of any provision of that declaration.

ARTICLE III

1. The Tribunal shall consist of nine members or such larger multiple of three as Iran and the United States may agree are necessary to conduct its business expeditiously. Within ninety days after the entry into force of this agreement, each government shall appoint one-third of the members. Within thirty days after their appointment, the members so appointed shall by mutual agreement select the remaining third of the members and appoint one of the remaining third President of the Tribunal. Claims may be decided by the full Tribunal or by a panel of three members of the Tribunal as the President shall determine. Each such panel shall be composed by the President and shall consist of one member appointed by each of the three methods set forth above.

2. Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the parties or by the Tribunal to ensure that this agreement can be carried out. The UNCITRAL rules for appointing members of three-member Tribunals shall apply *mutatis mutandis* to the appointment of the Tribunal.

3. Claims of nationals of the United States and Iran that are within the scope of this agreement shall be presented to the Tribunal either by claimants themselves, or, in the case of claims of less than $250,000, by the Government of such national.

4. No claim may be filed with the Tribunal more than one year after the entry into force of this agreement or six months after the date the President is appointed, whichever is later. These deadlines do not apply to the procedures contemplated by Paragraphs 16 and 17 of the Declaration of the Government of Algeria of January 19, 1981.

ARTICLE IV

1. All decisions and awards of the Tribunal shall be final and binding.

2. The President of the Tribunal shall certify, as prescribed in Paragraph 7 of the Declaration of the Government of Algeria of January 19, 1981, when all arbitral awards under this agreement have been satisfied.

3. Any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws.

ARTICLE V

The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

ARTICLE VI

1. The seat of the Tribunal shall be The Hague, The Netherlands, or any other place agreed by Iran and the United States.

2. Each government shall designate an agent at the seat of the Tribunal to represent it to the Tribunal and to receive notices or other communications directed to it or to its nationals, agencies, instrumentalities, or entities in connection with the proceedings before the Tribunal.

3. The expenses of the Tribunal shall be borne equally by the two governments.

4. Any question concerning the interpretation or application of this agreement shall be decided by the Tribunal upon the request of either Iran or the United States.

ARTICLE VII

For the purposes of this agreement:

1. A "national" of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock.

2. "Claims of nationals" of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which the agreement enters into force, by nationals of that state, including claims that are owned indirectly by such nationals through ownership of capital stock or other pro-

prietary interests in judicial persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this agreement. Claims referred to the Arbitral Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court.

8. "Iran" means the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.

4. The "United States" means the Government of the United States, any political subdivision of the United States, any agency, instrumentality or entity controlled by the Government of the United States or any political subdivision thereof.

ARTICLE VIII

This agreement shall enter into force when the Government of Algeria has received from both Iran and the United States a notification of adherence to the agreement.

Initialed on January 19, 1981

by Warren M. Christopher
Deputy Secretary of State
of the Government of the United States
By virture of the powers vested in him by his Government
as deposited with the Government of Algeria

UNDERTAKINGS OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN WITH RESPECT TO THE DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA

1. At such time as the Algerian Central Bank notifies the Governments of Algeria, Iran, and the United States that it has been notified by the Central Bank that the Central Bank has received for deposit in dollar, gold bullion, and securities accounts in the name of the Algerian Central Bank, as escrow agent, cash and other funds, 1,632,917.779 ounces of gold (valued by the parties for this purpose at $0.9397 billion), and securities (at face value) in the aggregate amount of $7.955 billion, Iran shall immediately bring about the safe departure of the 52 U.S. nationals detained in Iran. Upon the making by the Government of Algeria of the certification described in Paragraph 3 of the Declaration, the Algerian Central Bank will issue the instructions required by the following paragraph.

2. Iran having affirmed its intention to pay all its debts and those of its controlled institutions, the Algerian Central Bank acting pursuant to Paragraph 1 above will issue the following instructions to the Central Bank:

(A) To transfer $3.667 billion to the Federal Reserve Bank of New York to pay the unpaid principal of and interest through December 31, 1980 on (1) all loans and credits made by a syndicate of banking institutions, of which a U.S. banking institution is a member, to the Government of Iran, its agencies, instrumentalities or controlled entities, and (2) all loans and credits made by such a syndicate which are guaranteed by the Government of Iran or any of its agencies, instrumentalities or controlled entities.

(B) To retain $1.418 billion in the escrow account for the purpose of paying the unpaid principal or the interest owing, if any, on the loans and credits referred to in Paragraph (A) after application of the $3.667 billion and on all other indebtedness held by United States banking institutions of, or guaranteed by, the Government of Iran, its agencies, instrumentalities or controlled entities not previously paid and for the purpose of paying disputed amounts of deposits, assets, and interests, if any, owing on Iranian deposits in U.S. banking institutions. Bank Markazi and the appropriate United States banking institutions shall promptly meet in an effort to agree upon the amounts owing.

In the event of such agreement, the Bank Markazi and the appropriate banking institution shall certify the amount owing to the Central Bank of Algeria which shall instruct the Bank of England to credit such amount to the account, as appropriate, of the Bank Markazi or of the Federal Reserve Bank of New York in order to permit payment to the appropriate banking institution. In the event that within 30 days any U.S. banking institution and the Bank Markazi are unable to agree upon the amounts owed, either party may refer such dispute to binding arbitration by such international arbitration panel as the parties may agree, or failing such agreement within 30 additional days after such reference, by the Iran-United States Claims Tribunal. The presiding officer of such panel or tribunal shall certify to the Central Bank of Algeria the amount, if any, determined by it to be owed, whereupon the Central Bank of Algeria shall instruct the Bank of England to credit such amount to the account of the Bank Markazi or of the Federal Reserve Bank of New York in order to permit payment to the appropriate banking institution. After all disputes are resolved either by

agreement or by arbitration award and appropriate payment has been made, the balance of the funds referred to in this Paragraph (B) shall be paid to Bank Markazi.

(C) To transfer immediately to, or upon the order of, the Bank Markazi all assets in the escrow account in excess of the amounts referred to in Paragraphs (A) and (B).

Initialed on January 19, 1981

by Warren M. Christopher
Deputy Secretary of State
of the Government of the United States
By virtue of the powers vested in him by his Government
as deposited with the Government of Algeria

ESCROW AGREEMENT

This Escrow Agreement is among the Government of the United States of America, the Federal Reserve Bank of New York (the "FED") acting as fiscal agent of the United States, Bank Markazi Iran, as an interested party, and the Banque Centrale d'Algerie acting as Escrow Agent.

This Agreement is made to implement the relevant provisions of the Declaration of the Government of Algeria of January 19, 1981 (the "Declaration"). These provisions concern the establishment of escrow arrangements for Iranian property tied to the release of United States nationals being held in Iran.

1. In accordance with the obligations set forth in paragraph 4 of the Declaration, and commencing upon the entry into force of this Agreement, the Government of the United States will cause the FED to:

(A) Sell, at a price which is the average for the middle of the market, bid and ask prices for the three business days prior to the sale, all U.S. Government securities in

its custody or control as of the date of sale, which are owned by the Government of Iran, or its agencies, instrumentalities or controlled entities; and

(B) Transfer to the Bank of England as depositary for credit to accounts on its books in the name of the Banque Centrale d'Algerie, as Escrow Agent under this Agreement, all securities (other than the aforementioned U.S. Government securities), funds (including the proceeds from the sale of the aforementioned U.S. Government securities), and gold bullion of not less than the same fineness and quality as that originally deposited by the Government of Iran, or its agencies, instrumentalities or controlled entities, which are in the custody or control of the FED and owned by the Government of Iran, or its agencies, instrumentalities or controlled entities as of the date of such transfer.

When the FED transfers the above Iranian property to the Bank of England, the FED will promptly send to the Banque Centrale d'Algerie a document containing all information necessary to identify that Iranian property (type, source, character as principal or interest).

Specific details relating to securities, funds and gold bullion to be transferred by the FED under this paragraph 1 are attached as Appendix A.

2. Pursuant to the obligations set forth in paragraphs 5, 6 and 8 of the Declaration, the Government of the United States will cause Iranian deposits and securities in foreign branches and offices of United States banks, Iranian deposits and securities in domestic branches and offices of United States banks, and other Iranian assets (meaning funds or securities) held by persons or institutions subject to the jurisdiction of the United States, to be transferred to the FED, as fiscal agent of the United States, and then by the FED to the Bank of England for

credit to the account on its books opened in the name of the Banque Centrale d'Algerie as Escrow Agent under this Agreement (the Iranian securities, funds and gold bullion mentioned in paragraph 1 above and deposits, securities and funds mentioned in this paragraph 2 are referred to collectively as "Iranian property").

3. Insofar as Iranian property is received by the Bank of England from the FED in accordance with this Agreement, the Iranian property will be held by the Bank of England in the name of the Banque Centrale d'Algerie as Escrow Agent as follows:

- The securities will be held in one or more securities custody accounts at the Bank of England in the name of the Banque Centrale d'Algerie as Escrow Agent under this Agreement.
- The deposits and funds will be held in one or more dollar accounts opened at the Bank of England in the name of Banque Centrale d'Algerie as Escrow Agent under this Agreement. These deposits and funds will bear interest at rates prevailing in money markets outside the United States.
- The gold bullion will be held in a gold bullion custody account at the Bank of England, in the name of the Banque Centrale d'Algerie as Escrow Agent under this Agreement.
- It will be understood that the Banque Centrale d'Algerie shall have no liability for any reduction in the value of the securities, bullion, and monies held in its name as Escrow Agent at the Bank of England under the provisions of this Agreement.

4. (a) As soon as the Algerian Government certifies in writing to the Banque Centrale d'Algerie that all 52 United States nationals identified in the list given by the United States Government to the Algerian Government in No-

vember, 1980, now being held in Iran, have safely departed from Iran, the Banque Centrale d'Algerie will immediately give the instructions to the Bank of England specifically contemplated by the provisions of the Declaration and the Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria, which are made part of this Agreement. The contracting parties resolve to work in good faith to resolve any difficulty that could arise in the course of implementing this Agreement.

(b) In the event that

(i) either the Government of Iran or the Government of the United States notifies the Government of Algeria in writing that it has given notice to terminate its commitments under the Declaration referred to above, and

(ii) a period of 72 hours elapses after the receipt by the Government of Algeria of such notice, during which period the Banque Centrale d'Algerie has not given the Bank of England the instruction described in subparagraph (a) above, the Banque Centrale d'Algerie will immediately give the instructions to the Bank of England specifically contemplated by the provisions of the Declaration and the Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria.

(c) If the certificate by the Government of Algeria referred to in subparagraph (a) has been given before the United States Government has effectively terminated its commitment under the Declaration, the Iranian property

shall be transferred as provided in subparagraph (a) of this paragraph 4.

(d) The funds and deposits held by the Bank of England under this Agreement will earn interest at rates prevailing in money markets outside the United States after their transfer to the account of the Banque Centrale d'Algerie, as Escrow Agent, with the Bank of England, and such interest will be included as part of the Iranian property for the purposes of subparagraphs (a) and (b) of this paragraph 4.

5. On the date of the signing of this Agreement by the four parties hereto, the Banque Centrale d'Algerie and the FED will enter into a Technical Arrangement with the Bank of England to implement the provisions of this Agreement.

Pursuant to that Technical Arrangement between the FED, the Bank of England and the Banque Centrale d'Algerie, the FED shall reimburse the Bank of England for losses and expenses as provided in paragraph 10 thereof. The FED will not charge the Banque Centrale d'Algerie for any expenses or disbursements related to the implementation of this Agreement.

6. This Agreement will become effective as soon as it has been signed by the four parties to it and the Banque Centrale d'Algerie and the FED have entered into the Technical Arrangement with the Bank of England referred to in paragraph 5 of this Agreement.

7. Throughout its duration, this Agreement may be amended, canceled, or revoked only with the written concurrence of all four of the signatory parties.

8. Nothing in this Agreement shall be considered as constituting, in whole or in part, a waiver of any immunity to which the Banque Centrale d'Algerie is entitled.

9. A French language version of this Agreement will be prepared as soon as practicable. The English and French versions will be equally authentic and of equal value.

10. This Agreement may be executed in counterparts, each of which constitutes an original.

IN WITNESS WHEREOF, the parties hereto have signed this Agreement on January 20, 1981.

FOR THE GOVERNMENT OF THE
UNITED STATES OF AMERICA

WARREN M. CHRISTOPHER

FOR THE FEDERAL RESERVE BANK OF
NEW YORK
AS FISCAL AGENT OF THE UNITED STATES

ERNEST T. PATRIKIS

FOR THE BANK MARKAZI IRAN

ESFANDIAR RACHIDZADEH

FOR THE BANQUE CENTRALE D'ALGERIE

MOHAMED BESSEKHOUAD
LAKHDAR BENOUATAF

APPENDIX A

Securities, Gold Bullion, and Funds to be transferred by the Federal Reserve Bank of New York

International Bank for Reconstruction and Development Securities $35 million (face value)
Gold Bullion 1,632,917.746 fine ounces of gold, good delivery, London bars of a fineness of 995 parts per 1,000 or better
Funds Approximately $1.38 billion

TECHNICAL ARRANGEMENT BETWEEN BANQUE CENTRALE D'ALGERIE AS ESCROW AGENT AND THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND AND THE FEDERAL RESERVE BANK OF NEW YORK AS FISCAL AGENT OF THE UNITED STATES

This Technical Arrangement is made between the Banque Centrale d'Algerie (hereinafter referred to as the "Escrow Agent") as Escrow Agent, the Governor and Company of the Bank of England (hereinafter referred to as the "Bank"), and the Federal Reserve Bank of New York as fiscal agent of the United States (hereinafter referred to as the "FED").

1. The Bank is hereby appointed to hold, invest and distribute, in accordance with the terms of this Technical Arrangement, such of the funds and other property (as identified by the FED on its sole responsibility at the time of transfer) as may be transferred to them by the FED and such other funds or property representing such funds and other property as may from time to time be held by the Bank on such accounts or invested by the Bank pursuant to paragraph 4 hereof (all of which funds and property are collectively referred to as the "Escrow Fund"). The Bank shall act as a depositary and shall hold and invest the Escrow Fund in accordance with the arrangements described herein until such time as the Escrow Fund shall have been distributed as provided in paragraph 7 below.

2. The Bank will open in the name of the Escrow Agent the following accounts:

(A) Two securities custody accounts, Securities Custody Account No. 1 and Securities Custody Account No. 2 (the "Securities Custody Accounts");

(B) Three accounts denominated in US dollars, "Dollar Account No. 1", "Dollar Account No. 2" and "Dollar Account No. 3" (the "Dollar Accounts");

(C) A gold bullion custody account (the "Bullion Account") and shall credit the securities to Securities Custody Account No. 1, the dollar deposits to Dollar Account No. 1 and the gold bullion to the Bullion Account when transferred to the Bank by the FED for deposit on such accounts, and shall provide the Escrow Agent with a general description of the funds and other property so transferred.

3. The Bank shall

(A) Hold the securities for the time being in the Securities Custody Accounts in accordance with the provisions of this Arrangement;

(B) Hold the gold bullion for the time being in the Bullion Account in accordance with the provisions of this Arrangement; and

(C) Hold the funds for the time being in the Dollar Accounts on a call basis, so as to ensure the liquidity of those funds, and in accordance with the provisions of this Arrangement.

4. (a) The Bank shall make a good faith effort under the circumstances to invest and reinvest outside the United States the funds on the Dollar Accounts at market rates with such banks and in such manner as the Bank may determine and will pay by way of interest on the funds on those Dollar Accounts sums equivalent to those received by them, subject nevertheless to the deduction from Dollar Account No. 2 of sums equivalent to the amounts of their

reasonable costs, charges and expenses in respect to the maintenance and operation of Dollar Account No. 2.

(b) Any interest received on the securities in the Securities Custody Account No. 1 shall be credited to Dollar Account No. 1 and any interest received on the Securities Custody Account No. 2 shall be credited to Dollar Account No. 3.

5. The Bank shall invest all monies representing interest paid in respect of any part of the Escrow Fund in the same manner as any funds for the time being on deposit on the Dollar Accounts.

6. The Bank shall not have or incur any liability by reason of any diminution in value of the securities or gold bullion for the time being held by them in the name of the Escrow Agent on the Securities Custody Accounts and the Bullion Account, respectively.

Similarly, the Escrow Agent shall not have or incur any liability by reason of any diminution in value of the securities or gold bullion for the time being held in its name by the Bank on the Securities Custody Accounts and the Bullion Account respectively. Moreover, the Escrow Agent shall not have or incur any liability for any loss arising from investment of the funds held for the Escrow Agent on the Dollar Accounts.

In addition, the Escrow Agent shall not bear nor be liable for any expenses, charges, costs or fees of any kind incurred by the Bank or the FED in performance of their duties under this Arrangement.

7. In the performance of their duties under this Arrangement, the Bank shall not exercise any discretion designed to favour one of the parties to this Arrangement and shall act only on the instructions of the Escrow Agent.

(a) Provided that no previous instruction has been received under subparagraph (b) below, upon receipt of in-

structions from the Escrow Agent to do so, in the form provided in paragraph 8 below, the Bank shall immediately transfer the funds then held on Dollar Account No. 1 as follows:

(i) U.S. Dollars 3,667,000,000 to the FED, subject to the FED's sole direction;

(ii) U.S. Dollars 1,418,000,000 to Dollar Account No. 3; and

(iii) the balance to an account of Bank Markazi Iran opened at the Bank, subject to Bank Markazi Iran's sole direction

and transfer the securities and bullion then held in the Securities Custody Account No. 1 and the Bullion Account respectively to the account of Bank Markazi Iran at the Bank, subject to Bank Markazi Iran's sole direction.

(b) Provided that no previous instruction has been received under subparagraph (a) above, upon receipt of instructions from the Escrow Agent to do so, in the form provided in paragraph 8 below, the Bank shall immediately transfer the Escrow Fund to the account of the FED at the Bank, subject to the FED's sole direction, and close all the Accounts opened under paragraph 2 of this Arrangement.

(c) Any funds or securities received by the Bank from the FED for deposit on any of the accounts described in paragraph 2 of this Arrangement, other than Dollar Account No. 2, after receipt and execution by the Bank of the instructions referred to in subparagraph (a) above, shall be credited in accordance with the instructions of the Escrow Agent in the form provided in paragraph 8 below, to the account of Bank Markazi Iran at the Bank, subject to Bank Markazi Iran's sole direction, and to Dollar Account No. 3 and Securities Custody Account No. 2 at the Bank in the name of the Escrow Agent.

Not later than 30 days after the date hereof the Escrow Agent shall instruct the Bank to transfer the funds and securities in these accounts to such bank as the Escrow Agent shall direct, for the account of the Banque Centrale d'Algerie.

(d) Upon receipt by the Bank of instructions from the Escrow Agent to do so in the form provided in paragraph 8 below; the Bank shall, as soon as practicable thereafter

(i) transfer such amount as may be specified in the instructions from Dollar Account No. 2 to the FED, subject to the FED's sole direction, if sufficient funds then remain or, Dollar Account No. 2 to make such transfer; and or

(ii) transfer the remaining funds on Dollar Account No. 2 to the account of Bank Markazi Iran at the Bank, subject to Bank Markazi Iran's sole direction, and close Dollar Account No. 2.

(e) The Escrow Agent shall not be entitled to give the Bank any instruction other than described in this paragraph 7, and the Bank shall be entitled and bound to rely on any instruction falling within this paragraph 7 without further inquiry, and any transfer by the Bank in accordance with any instructions given to them under this paragraph 7 shall constitute a good discharge to the Bank.

8. (a) The Bank and the Escrow Agent will exchange telegraphic keys which will permit the reciprocal validation of messages and payment and transfer orders; however, the instructions set forth in paragraphs 7(a) and 7(b) shall be in writing, shall be transmitted by hand either

(i) to the Bank or

(ii) to the Deputy Governor of the Bank for and on behalf of the Bank at the British Embassy at Algiers

and shall be authenticated as provided in subparagraph (b) below. In the event that a telegraphic test is challenged,

the Bank and the Escrow Agent agree to contact each other by telex or other appropriate means as rapidly as possible, in order to obtain confirmation of the authenticity of the transmission.

(b) The Bank and the Escrow Agent shall provide each other with a list, which will be revised whenever necessary, of the names of the persons authorized to execute any written notice or instruction required or permitted under this Arrangement and identify the signatures of such designated persons; all such notices or instructions to the Bank shall be effective on receipt by the Bank; the Bank shall not be obliged to act on any such notice or instruction unless properly so authorised, authenticated and delivered in the manner required by this paragraph.

9. Except as provided in paragraph 8(a) above, any advices, written notices, or instructions permitted or required by this Arrangement shall be given to the parties hereto at the respective addresses shown below:

(i) To the Bank at:
Threadneedle Street
London EC2R 8AH
ATTENTION: D.H.F. Somerset
J.G. Drake
W.B. Moule

(ii) To the FED at:
33 Liberty Street
New York, New York 10045
ATTENTION: H. David Willey
George Ryan

(iii) To the Escrow Agent at:
8 Boulevard Zirout Youcef
Algiers, Algeria
ATTENTION: Mr. Mohamed Bessekhouad
Mr. Bachir Safi
Mr. Mohand Kirat
Mr. Lakhdar Benouataf

10. The FED shall indemnify and hold the Bank harmless against and shall reimburse the Bank for any loss or expense that they may incur by reason of their acts or omissions under or in connection with this Arrangement, except for

(A) Any loss or expense resulting from their own negligence or wilful misconduct and

(B) Any loss arising from investment of the funds held for the Escrow Agent on Dollar Accounts No. 1, No. 2 and No. 3.

11. The Bank may rely and shall be protected in acting on any instrument, instruction, notice or direction given by the Escrow Agent in accordance with paragraph 7 reasonably believed by them to be genuine and to have been signed or dispatched by the appropriate person or persons.

12. The Bank shall not be liable for any act or omission unless such act or omission involves negligence or wilful misconduct on the part of the Bank. This paragraph 12 does not apply to any loss arising from investment of the funds held for the Escrow Agent on the Dollar Accounts.

13. (a) The Bank shall advise the Escrow Agent by telex as soon as reasonably practicable thereafter of all changes in balances, deposits, interest earned and withdrawals on the six accounts opened and maintained by the Bank for the Escrow Agent as provided in paragraph 2 of this Arrangement.

(b) The Bank shall provide the FED by telex with a list of all debits and credits to the six accounts referred to in subparagraph (a) above.

14. The Bank and the FED accept that the Escrow Agent is a central bank, whose property is normally entitled to the full immunities of a central bank under the State Immunity Act of 1978 of the United Kingdom. Nothing in this Arrangement shall be considered as con-

stituting, in whole or in part, a waiver of any immunity to which they are entitled.

15. Nothing herein shall require the Bank to violate the laws of England or any court order thereunder, the Bank confirms that none of the provisions of this Arrangement is in violation of the laws of England.

16. The provisions hereof may not be modified or changed except by an instrument in writing duly executed by or on behalf of the Escrow Agent, the Bank and the FED.

17. This Arrangement is written in English and French texts but, in the event of any conflict between the two texts, the English text shall prevail.

18. The arrangements described herein shall be governed by and construed in accordance with the laws of England.

Dated 20th of January 1981

BANQUE CENTRALE D'ALGERIE

by MOHAMED BESSEKHOUAD
LAKHDAR BENOUATAF

THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND

by C. W. MCMAHON
D.H.F. SOMERSET

FEDERAL RESERVE BANK OF NEW YORK AS FISCAL AGENT OF THE UNITED STATES

by ERNEST T. PATRIKIS

Supreme Court of the United States

No. 88-952

UNITED STATES, APPELLANT

v.

SPERRY CORPORATION, ET AL.

APPEAL from the United States Court of Appeals for the Federal Circuit. The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

February 21, 1989

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APPELLANT'S

BRIEF

Supreme Court, U.S.
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No. 88-952 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, APPELLANT

v.

SPERRY CORPORATION AND SPERRY WORLD TRADE, INC.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

The Federal Reserve Bank of New York has been designated to receive payment of awards by the Iran-United States Claims Tribunal in favor of United States claimants. Section 502 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, 99 Stat. 438, requires the Federal Reserve Bank to deduct from any such award 1½% of the first $5 million and 1% of any amount in excess of $5 million, to reimburse the United States Government for expenses it incurs in connection with the arbitration and payment of claims of United States claimants against Iran. The question presented in the Jurisdictional Statement is:

1. Whether Section 502 is unconstitutional on the ground that it effects a taking of the property of successful United States claimants before the Tribunal, without payment of just compensation.

In their Motion to Dismiss or Affirm, appellees defend the judgment on alternative grounds, which present the following additional questions:

2. Whether Section 502 violates the Due Process Clause of the Fifth Amendment because it has a retroactive effective date of June 7, 1982, when the Secretary of the Treasury issued an administrative order imposing a comparable fee under different statutory authority.

3. Whether Section 502 violates the equal protection component of the Due Process Clause because it imposes a fee only on successful United States claimants.

4. Whether Section 502 violates the constitutional requirement that "All Bills for raising Revenue shall originate in the House of Representatives" (Art. I, § 7, Cl. 1) because the Iran Claims Settlement Act, of which Section 502 is a part, was added to the foreign relations authorization bill by the Senate.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-952

UNITED STATES OF AMERICA, APPELLANT

v.

SPERRY CORPORATION AND SPERRY WORLD TRADE, INC.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-11a) is reported at 853 F.2d 904, and the opinion of the United States Claims Court (J.S. App. 12a-25a) is reported at 12 Cl. Ct. 736. The prior oral ruling of the Claims Court (J.S. App. 26a-51a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1988, and the notice of appeal (J.S. App. 52a-53a) was filed on September 8, 1988. On November 1, 1988, the Chief Justice extended the time for docketing the appeal to and including December 7, 1988, and the jurisdictional statement was filed on that date. The Court noted probable jurisdiction on February 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 7, Clause 1 of the United States Constitution provides:

[1] Section 1252 was repealed by Section 1 of Public Law No. 100-352, 102 Stat. 662, which was enacted on June 27, 1988. However, Section 7 of Public Law 100-352 provides that the repeal of 28 U.S.C. 1252 "shall take effect ninety days after the date of the enactment of this Act" (*i.e.*, on September 25, 1988) and "shall not * * * affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date" (102 Stat. 664). In this case, the judgment of the court of appeals was entered on August 10, 1988, before the effective date of the repeal of 28 U.S.C. 1252, and a direct appeal therefore lies to this Court.

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

2. The Fifth Amendment of the United States Constitution provides in pertinent part:

> No person * * * shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. Section 502 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, 99 Stat. 438, 50 U.S.C. 1701 note (Supp. IV 1986), provides:

> (a) DEDUCTION FOR EXPENSES OF THE UNITED STATES.—Except as provided in section 503, the Federal Reserve Bank of New York shall deduct from the aggregate amount awarded under each enumerated claim before the Iran-United States Claims Tribunal in favor of a United States claimant, an amount equal to 1½ percent of the first $5,000,000 and 1 percent of any amount over $5,000,000, as reimbursement to the United States Government for expenses incurred in connection with the arbitration of claims of United States claimants against Iran before that Tribunal and the maintenance of the Security Account established pursuant to the Declarations of the Democratic and Popular Republic of Algeria of January 19, 1981. The Federal Reserve Bank of New York shall make the deduction required by the preceding sentence whenever the Bank receives an amount from the Security Account in satisfaction of an award rendered by the Iran-United States Claims Tribunal on the enumerated claim involved.
>
> (b) DEDUCTION TREATED AS MISCELLANEOUS RECEIPT.—Amounts deducted by the Federal Reserve Bank of New York pursuant to subsection (a) shall be deposited into the Treasury of the United States to the credit of miscellaneous receipts.
>
> (c) PAYMENT TO UNITED STATES CLAIMANTS.—Nothing in this section shall be construed to affect the payment to United States claimants of amounts received by the Federal Reserve Bank of New York in respect of awards by the Iran-United States Claims Tribunal, after deduction of the amounts calculated in accordance with subsection (a).
>
> (d) EFFECTIVE DATE.—This section shall be effective as of June 7, 1982.

STATEMENT

1. a. Appellees are two corporations organized under the laws of Delaware. During the 1970s, they were parties to various contracts with the Government of Iran and its instrumentalities for the lease of computer systems and the performance of data processing services. In 1974, appellees established a branch office in Tehran, Iran, in order to facilitate the conduct of their business in that country. J.S. App. 13a.

On November 4, 1979, "the American Embassy in Tehran was seized and our diplomatic personnel were captured and held hostage." *Dames & Moore* v. *Regan*, 453 U.S. 654, 662 (1981). Ten days later, in response to the taking of the hostages and a threat by Iran to withdraw its assets from the United States (see 15 Weekly Comp. Pres. Doc. 2117 (Nov. 14, 1979)), the President declared a national emergency pursuant to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701-1706 (1976 ed. Supp. III 1979). The President also issued an Executive Order blocking the removal or transfer of "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States." Exec. Order No. 12170, 3 C.F.R. 457 (1980), 50 U.S.C. 1701 note (Supp. IV 1986). See *Dames & Moore*, 453 U.S. at 662-663.

On November 15, 1979, the Secretary of the Treasury issued implementing regulations declaring "null and void" any attachment or judgment affecting Iranian property that was covered by the blocking order, unless the attachment or judgment was licensed by the Secretary. 31 C.F.R. 535.203(e) (1980). The regulations expressly provided that any such license could be

amended, modified, or revoked at any time. 31 C.F.R. 535.805 (1980). On November 26, 1979, the Secretary granted a general license authorizing specific judicial proceedings against Iran. 31 C.F.R. 535.504(a) (1980). A clarifying regulation, issued approximately three weeks later, stated that this license authorized "prejudgment attachments," but not "the entry of any judgment or of any decree or order of similar or analogous effect." 31 C.F.R. 535.418, 535.504(b)(1) (1980). See *Dames & Moore*, 453 U.S. at 663.

Several months after the President blocked Iranian assets in the United States, appellees withdrew all of their non-Iranian personnel from Iran as a result of increasing hostility toward American business interests in that country.[2] In July 1980, appellees filed suit against Iran and a number of its instrumentalities in the United States District Court for the District of Columbia seeking a total of $18 million in damages for past-due computer rentals, conversion of assets that Iran allegedly had prevented appellees from removing from that country, and interference with business relationships. On October 24, 1980, appellees obtained a pre-judgment attachment of certain Iranian assets located in the United States. *Sperry Corp.* v. *Islamic Republic of Iran*, No. CA-80-1614 (D.D.C. Oct. 24, 1980).[3]

b. After these events—and after the break in diplomatic relations between Iran and the United States and the loss of American lives in a military operation to rescue the hostages—the United States and Iran entered into an agreement on January 19, 1981. The agreement took the form of the adherence by the two governments to two declarations of the Government of Algeria, commonly referred to as the "Algiers

[2] See *Iran Claims Act: Hearing on H.R. 3241 Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 98th Cong., 1st Sess. 31-32 (1983) (testimony of David K. Anderson, General Counsel, Sperry Corporation Computer Systems) [hereinafter *1983 Hearing*].

[3] The attachments of Iranian bank accounts and letters of credit were valued by appellees at $7 million. See *1983 Hearing* at 30, 32 (statement of David K. Anderson, General Counsel, Sperry Corporation Computer Systems).

Accords." See Declaration of the Government of the Democratic and Popular Republic of Algeria; Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, *both reprinted in* 19 Bureau of Public Affairs, U.S. Department of State, *Selected Papers* 2-5 (Mar. 12, 1981) (J.A. 29-43).

In general terms, the Algiers Accords provided for the release of the American hostages, the unfreezing of Iranian assets in the United States, and the resolution of claims by the nationals of each party against the government of the other, as well as claims between the two governments. As relevant here, the Accords stated that a "purpose of both parties" was "to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of such claims through binding arbitration" (J.A. 30). The United States therefore undertook "to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises," and "to nullify all attachments and judgments obtained therein" (J.A. 30). *Dames & Moore*, 453 U.S. at 665.

The Accords further provided for the establishment at The Hague of an international arbitral tribunal, known as the Iran-United States Claims Tribunal, to hear and render "final and binding" decisions that are enforceable in the courts of any nation under its laws (J.A. 38, 41). The Tribunal's jurisdiction includes claims based on contract, debt, expropriation and certain other grounds (J.A. 38). Any such claims were required to be filed with the Tribunal within one year of the entry into force of the Accords or within six months of the appointment of the President of the Tribunal, whichever was later (J.A. 40). The United States was obligated to bring about the transfer of all Iranian assets that were held by banks in this country or by United States banks abroad and that previously had been blocked by the President (J.A. 32-35). Of those assets, up to $1 billion were to be placed in a "Security Account," for the purpose of securing the payment of, and paying, the claims of

United States claimants against Iran. Iran was required to maintain a minimum balance of $500 million in the Security Account until all Tribunal awards against Iran had been paid (J.A. 33-34). See *Dames & Moore*, 453 U.S. at 664-665).[4] The Accords required each government to designate an agent at The Hague to represent it at the Tribunal and to receive notices or other communications directed to it or its nationals (J.A. 41). Finally, the Accords provided that "[t]he expenses of the Tribunal shall be borne equally by the two governments" (J.A. 41).

President Carter issued a series of Executive Orders on January 19, 1981, to implement the Algiers Accords. Those Executive Orders revoked all licenses permitting the exercise of "any right, power, or privilege" with regard to Iranian assets; nullified all non-Iranian interests in such assets acquired after November 14, 1979; and directed persons holding blocked Iranian financial assets to transfer them to the Federal Reserve Bank of New York as fiscal agent of the United States, for disposition as directed by the Secretary of the Treasury. Exec. Order Nos. 12277-12281, 3 C.F.R. 105-113 (1982), 50 U.S.C. 1701 note (Supp. IV 1986).

On February 24, 1981, a little more than one month after his inauguration, President Reagan issued an Executive Order in which he "ratified" the Executive Orders issued by President Carter on January 19, 1981; "suspended" all claims that may be presented to the * * * Tribunal"; and provided that such claims "shall have no legal effect in any action now pending in any court of the United States." Exec. Order No. 12294, 3 C.F.R. 139 (1982), 50 U.S.C. 1701 note (Supp. IV 1986). The Order provided that a claim would be discharged for all purposes when the Tribunal either awarded some recovery and that amount was paid, or the Tribunal determined that no recovery was due. *Dames & Moore*, 453 U.S. at 665-666.

The Federal Reserve Bank of New York is the fiscal agent of the United States in carrying out the Algiers Accords. Under

[4] The Security Account is maintained in the N.V. Settlement Bank, a subsidiary of the Dutch Central Bank, under the control of the Central Bank of Algeria as the escrow agent.

this arrangement, awards made by the Tribunal in favor of United States claimants are paid from the Security Account to the Federal Reserve Bank, which then pays the awards to the claimants. J.S. App. 13a; 47 Fed. Reg. 25243 (1982).[5]

c. This Court sustained the President's actions in *Dames & Moore*, which was decided in July 1981. The Court expressly held that the President's revocation of pre-judgment attachments of Iranian assets that were obtained pursuant to the Treasury license did not constitute a taking of property because those attachments were revocable and "in every sense subordinate to the President's power under the IEEPA" (453 U.S. at 674 n.6). Following the Court's decision in *Dames & Moore*, more than $2 billion in frozen Iranian assets held by banks in the United States were marshalled for disposition as required by the Algiers Accords; of that amount, $1 billion were deposited in the Security Account, and the remainder was transferred to Iran.[6] Thereafter, appellees filed a claim against Iran with the Tribunal, seeking payment of past-due computer rentals and reimbursement for assets that Iran allegedly had not permitted appellees to remove from that country. *Sperry Corp. & Sperry World Trade, Inc.* v. *Islamic Republic of Iran*, Case No. 205 (filed Jan. 11, 1982). See J.S. App. 3a, 14a.

2. On June 7, 1982, before the Federal Reserve Bank of New York paid any Tribunal awards to United States claimants, the Department of the Treasury issued a "directive license" requiring the Federal Reserve Bank to deduct 2% from each award certified by the Tribunal, and to pay that amount into the Treasury "to reimburse the United States Government for costs

[5] When the Tribunal makes an award in favor of a United States claimant, it notifies the Central Bank of Algeria, which in turn notifies the Dutch bank in which the funds are deposited. The latter bank then transfers the funds necessary to pay the award to the Federal Reserve Bank of New York. See *Claims Against Iran: Hearing Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. 4 (1982) [hereinafter *1982 Hearing*].

[6] An additional amount of Iranian assets, totalling $7.955 billion, had previously been transferred to the Central Bank of Algeria at the time of the settlement on January 19, 1981, for distribution to two special accounts for payment of bank claims and to Iran. J.A. 43-45.

it incurred for the benefit of U.S. nationals who have claims against Iran." 47 Fed. Reg. 25243 (1982). The directive license was issued pursuant to the Independent Offices Appropriations Act (IOAA), now codified at 31 U.S.C. 9701 (Supp. IV 1986), which authorizes each federal agency to promulgate regulations establishing a fair charge for services provided by that agency, based on the costs to the government, the value of the services, and the public policy and interests to be served. See *Skinner* v. *Mid-America Pipeline Co.*, No. 87-2098 (Apr. 25, 1989), slip op. 10-11; *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974).[7]

3. On July 8, 1982, approximately one month after the Treasury Department issued the directive license, appellees and Iran formally entered into a settlement agreement and filed a request with the Tribunal for an "Award on Agreed Terms" to give effect to the settlement. See note 21, *infra*. On September 14, 1982, the Tribunal entered the requested award on agreed terms. *Sperry Corp. & Sperry World Trade, Inc.* v. *The High State Council of Informatics of the Islamic Republic of Iran*, AWD No. 10-205-2 (J.A. 20-21). In that award, the Tribunal "accepted and recorded" the settlement, stating that it was "binding on both parties, and consequently [Iran] is obligated to pay [appellees] the sum of * * * [$2,800,000], which obligation shall be satisfied by payment out of the Security Account" (J.A. 21).[8] When the Federal Reserve Bank of New York received payment of the Tribunal's award in favor of appellees, it deducted the 2% charge ($56,000), deposited that amount in the Treasury pursuant to the directive license, and paid the balance of $2,744,000 to appellees. J.S. App. 3a, 14a.

4. On December 17, 1982, appellees filed this action in the United States Claims Court (J.A. 1, 9-18). Appellees contended,

[7] At the time the directive license was issued, the IOAA was codified at 31 U.S.C. 483a (1976 ed.). The IOAA was redesignated as 31 U.S.C. 9701 as part of the recodification of Title 31 that was enacted by the Act of Sept. 13, 1982, Pub. L. No. 97-258, § 1, 96 Stat. 1051.

[8] Iran had indicated that it would file a counterclaim with the Tribunal seeking recovery of past-due taxes from appellees, and that counterclaim was taken into account in the settlement. See *1983 Hearing* at 32-33.

inter alia, that the deduction of the 2% percent charge from the amount of the Tribunal's award in its favor violated the IOAA and the Fifth Amendment of the United States Constitution. On May 1, 1985, the Claims Court rendered an oral decision concluding that the Treasury Department's directive license violated the IOAA (J.S. App. 26a-51a) because it imposed a fee for services furnished not only by that Department, but also by the Departments of State and Justice (*id.* at 35a-37a), and because the administrative record did not sufficiently show the basis for the calculation of the government's expenses or the apportionment of those expenses to Tribunal awards. (*id.* at 37a-47a).[9]

5. Congress reacted immediately to the Claims Court's oral ruling by enacting previously proposed legislation that specifically authorized the assessment of a fee against successful United States claimants before the Tribunal.[10] Thus, on August 16, 1985, before the Claims Court entered a final judgment based on its oral ruling, Congress enacted the Iran Claims Settlement Act as Title V of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, §§ 501-505, 99 Stat. 437-439, 50 U.S.C. 1701 note (Supp. IV 1986). Section 502(a) of that Act requires the Federal Reserve Bank of New York to deduct from a Tribunal award "an amount equal to 1½ percent of the first $5,000,000 and 1 percent of any amount over $5,000,000, as reimbursement to the United States Government for expenses incurred in connection with the arbitration of claims against Iran before that Tribunal and the maintenance of the Security Account established pursuant to [the Algiers Accords]" (99 Stat. 438).[11] The statutory

[9] The Claims Court denied appellees' motion to certify a class (C.A. App. A55), and appellees did not appeal that ruling.

[10] The Executive Branch had proposed such a measure in 1982, which was introduced as H.R. 7374, 97th Cong., 2d Sess. (1982). See *1982 Hearing* at 1, 45-48. A similar bill was introduced the following year as H.R. 3241, 98th Cong., 1st Sess. (1983). See *1983 Hearing* at 37-41.

[11] The 1½% fee is deducted from the amount of Tribunal awards in favor of agencies of the United States Government as well as private claimants. We have been informed by the Department of State that, to date, there have been four such awards to government agencies. See *U.S.A. (Cataloging Distribu-*

requirement was made effective as of June 7, 1982 (§ 502(d), 99 Stat. 438), the date on which the Treasury Department had issued the directive license under the IOAA.

The legislative history shows that Section 502 was intended to reimburse the United States for such costs as the payment of one-half of the annual expenses of the Tribunal; one-half of the management fees paid to the depository of the Security Account; expenses of the Federal Reserve Bank of New York in marshalling Iranian assets for transfer to the Security Account and in receiving and distributing the payment of awards made by the Tribunal; the State Department's costs in maintaining offices in Washington and at The Hague to facilitate the filing of claims, service of Tribunal documents, and presentation of positions on major issues of common importance to United States claimants; and efforts by the Departments of the Treasury and Justice to ensure compliance with the Algiers Accords. See *Iran Claims Legislation: Hearing on S. 771 and S. 1166 Before the Senate Comm. on Foreign Relations*, 99th Cong., 1st Sess. 14-15, 26-32 (1985) [*1985 Hearing*]; *1983 Hearing* at 4-5, 9, 13-16; *1982 Hearing* at 4-5, 6, 13-17, 27. The legislative record further shows that as of 1985, the United States was contributing $900,000 annually for the maintenance of the Security Account and $2 million annually for the operations of the Tribunal, and that the State Department and other agencies were spending approximately $1 million annually to provide assistance to United States claimants. *1985 Hearing* at 14-15, 26.[12]

tion Service of the Library of Congress) v. *Iran*, AWD No. 319-B/39-2 (Oct. 9, 1987); *U.S.A. (Commodity Credit Corporation)* v. *Iran*, AWD No. 374-B/22/1 (July 1, 1988); *U.S.A. (National Bureau of Standards of the U.S. Department of Commerce)* v. *Iran*, AWD No. 376-B/31-3 (July 11, 1988); *U.S. Department of Energy (Oak Ridge Operations)* v. *Iran*, AWD No. 418-B/27-3 (Mar. 16, 1989).

[12] The State Department reported to Congress in 1985 that fees generated by the 2% directive license under the IOAA had covered only approximately one half of the expenses incurred by the government up to that point. *1985 Hearing* at 112. The United States' contribution for operation of the Tribunal has since increased to $2.886 million annually. Iran-United States Claims Tribunal, *Annual Report for Period Ending 30 June 1988*, at 51 (Dec. 15, 1988).

6. a. The enactment of Section 502 furnished express statutory authorization for the deduction of 1½% of the Tribunal's award to appellees ($42,000), and thereby mooted appellees' statutory challenge to assessment of a fee in that amount.[13] However, appellees argued that Section 502 is unconstitutional under the Just Compensation, Due Process and Origination Clauses of the Constitution.[14] The Claims Court rejected appellees' constitutional challenges and dismissed this suit (J.S. App. 12a-25a).

In rejecting appellees' challenge to Section 502 under the Just Compensation Clause (J.S. App. 15a-19a), the Claims Court observed that virtually every regulation, tax, or fee diminishes the value of the affected property to some extent (*id.* at 17a). In the court's view, the diminution in the value of the Tribunal's award in this case did not render Section 502 unconstitutional. The court relied on a number of factors: (i) the economic impact of the 1½% fee is "very small" and is far less substantial than the regulatory burdens this Court has sustained in its taking cases, including *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470 (1987) (J.S. App. 16a-17a); (ii) the deduction was neither novel nor unexpected, because during the preceding 35 years Congress has authorized the United States to deduct 5% of awards made by the Foreign Claims Settlement Commission as reimbursement for the United States' costs of adjudicating and settling claims against foreign governments (*id.* at 17a-18a, citing 22 U.S.C. 1621-1644m); (iii) the fee did not interfere with reasonable investment-backed expectations, because United States nationals doing business abroad necessarily assume the risk that the President may be required to exercise his established power to resolve their claims against a foreign government (J.S. App. 17a); and (iv) appellees "significantly

[13] The amount in excess of $42,000 that was withheld from appellees' award under the IOAA directive license, which required the Federal Reserve Bank to withhold 2% rather than 1½% of awards, was refunded to appellees. See 50 Fed. Reg. 34,959 (1985).

[14] The Origination Clause (Art. I, § 7, Cl. 1) provides that "All Bills for raising Revenue shall originate in the House of Representatives."

benefited from the Tribunal," whose activities are supported by the fee (*ibid.*).

Turning to appellees' other challenges, the Claims Court held that Section 502 does not contravene the Due Process Clause, because Congress had a rational basis for choosing to impose the fee on successful claimants but not on unsuccessful claimants (J.S. App. at 19a-21a) and because Congress's decision to give Section 502 a retroactive effective date of June 7, 1982, served to ensure that all claimants would be treated alike (*id.* at 23a-25a). The Claims Court also held that the Senate's addition of the Iran Claims Settlement Act (including the provision for assessment of the fee) to the foreign relations authorization bill passed by the House of Representatives did not violate the Origination Clause. Relying on this Court's decision in *Twin City Bank* v. *Nebeker*, 167 U.S. 196, 202-203 (1897), the Court held that Section 502 is outside the scope of that Clause because it provides for the collection of a fee as reimbursement for specific services rendered by the government, rather than the raising of revenue to support the government generally (J.S. App. 21a-23a).

b. The court of appeals reversed, holding that Section 502 is unconstitutional because it effects a taking of private property without payment of just compensation (J.S. App. 1a-11a). The court recognized that "[i]n the perhaps usual case where governmental activities must be assessed to see if they so impair private property rights as to amount to a taking," a court's inquiry is guided by three factors: " '(1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action" ' " (J.S. App. 5a, quoting *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 255 (1986), and *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978)). But it noted that this multi-factor analysis is inapplicable—and that a per se approach instead must be followed—where there is a physical occupation or appropriation of property (J.S. App. 5a-6a, citing *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). The court of appeals regarded the 1½%

deduction mandated by Section 502 as a permanent "appropriation" of the $42,000 in question, thereby triggering the per se approach of *Loretto* (J.S. App. 6a-7a). In the court's view, Section 502 provides for "seizing a percentage of the awards of the Tribunal" to pay "for the resolution of the hostage crisis," and it believed that the government should pay compensation when it uses private claims as " 'bargaining chips' " to further the Nation's foreign policy goals (*id.* at 8a, quoting *Dames & Moore*, 453 U.S. at 691 (Powell, J., concurring in part and dissenting in part)).

The court of appeals acknowledged that appellees did not contend that a taking occurred on the theory that the amount awarded by the Tribunal was less than what they would have received if the President had not entered into the settlement with Iran and their suit against Iran had proceeded in federal district court. The court instead focused more narrowly on the deduction of the 1½%, and it found a constitutional violation because that fee would not have been assessed against whatever judgment might ultimately have been rendered by the district court if appellees had been permitted to proceed with their suit (J.S. App. at 7a). The court reasoned as follows: (i) appellees "had a sufficient forum and remedy in the district court, the remedy secured by the pre-judgment attachment"; (ii) "[t]he Tribunal award was the substitute for a judgment by a United States court"; (iii) "the Tribunal fully paid [appellees'] claim against Iran"; and (iv) therefore, the 1½% diminution in the value of the substitute award constitutes a taking (*id.* at 8a).

The court of appeals had "no quarrel" with the proposition that "those who trade and travel abroad rely principally upon the relationships between our Government and others as the foundation for all rights" and that United States nationals therefore benefit from arrangements such as the Algiers Accords (J.S. App. 8a-9a). But the court did not believe that appellees realized any benefit from the Tribunal in this case, because "prior to the Accords [they] had secured the attachment of Iranian assets sufficient to cover [their] eventual award and, had the President not suspended American claims, would have had no need for the Tribunal" (*id.* at 8a-9a). The court

distinguished this case from *Shanghai Power Co.* v. *United States*, 4 Cl. Ct. 237 (1983), aff'd mem. 765 F.2d 159 (Fed. Cir.) (Table), cert. denied, 474 U.S. 909 (1985), which found no Just Compensation Clause violation in the President's settlement of claims against the People's Republic of China (PRC) for considerably less than the amount the plaintiff sought, on the ground that the American claimant there had no other recourse against the PRC (J.S. App. 9a). The court similarly distinguished the consistent practice of Congress in directing the deduction of a percentage of awards made under the International Claims Settlement Act of 1949 (see 22 U.S.C. 1626(b)), because in the court's view the settlement agreements in those instances likewise resolved claims for which the claimants had no effective recourse against the foreign government concerned (J.S. App. 10a).[13]

SUMMARY OF ARGUMENT

I. The 1½% fee assessed against successful claimants pursuant to Section 502 of the Foreign Relations Authorization Act is one aspect of the comprehensive and complex regime established by the Algiers Accords for the resolution of the claims of United States nationals against Iran. The enactment of Section 502 falls squarely within Congress's enumerated powers. Congress has the authority under the Foreign Commerce Clause (Art. I, § 8, Cl. 3) to charge a fee to those who engage in foreign commerce, in order to defray the costs incurred by the government and others in connection with the activities of those against whom the fee is assessed. See *Head Money Cases*, 112 U.S. 580 (1884). The assessment of a fee to support the work of the Tribunal also is a "necessary and proper" measure for "carrying into Execution" the power vested in the President by the Constitution (and confirmed by this Court in *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981)) to settle the claims of United States nationals through the Tribunal. See Art. I, § 8,

[13] In light of its holding that Section 502 violates the Just Compensation Clause of the Fifth Amendment, the court of appeals found it unnecessary to consider appellees' challenges under the Due Process and Origination Clauses (J.S. App. 11a).

Cl. 18. It is entirely appropriate for Congress to pass on these costs to the persons who realize a distinct and tangible benefit from the Tribunal's work.

II. Contrary to appellees' contention, the power to assess the fee that is conferred on Congress by Article I of the Constitution is not divested by the Just Compensation Clause of the Fifth Amendment.

A. The 1½% deduction from the payment of the Tribunal's award in appellees' favor is a "user fee" assessed against those United States claimants who have successfully invoked the jurisdiction of the Tribunal. This Court has repeatedly held that the Fifth Amendment, including its Just Compensation Clause, does not require a legislature to tailor general revenue measures, such as taxes, to the benefits conferred on the taxpayer or the costs incurred by the government on his behalf. *A fortiori*, the Just Compensation Clause does not bar Congress from imposing a fee that is reasonably tailored to reimburse the government for the expenses of a program that redounds to the special benefit of those who pay the fee.

B. The court of appeals erred in holding that the deduction of the 1½% fee from Tribunal awards constitutes a permanent physical "appropriation" of the funds in question, thereby triggering the per se taking analysis of *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Federal Reserve Bank's deduction of the $42,000 from the amount it received from the Security Account was merely the *means* by which the government collected the fee for services rendered, just as an employer's withholding of income taxes from an employee's pay is the means by which the government collects those taxes. Because the fee itself is valid, the provision for withholding it from the payment of awards raises no distinct constitutional problem. For the same reason, this case is wholly different from *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980). There, unlike in this case, the financial exaction was not a fee for services, and no other governmental justification was offered for it. The per se taking analysis of *Loretto* and *Webb's Fabulous Pharmacies* is especially inapt in this case because appellees and other claimants voluntarily in-

voked the jurisdiction of the Tribunal. As a result, like the utility pole owners in *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987), they voluntarily submitted to the regulatory measures associated with the claims-settlement mechanism, including assessment of a fee, and the amount of the fee is not "confiscatory" (see 480 U.S. at 251-253).

C. The court of appeals also based its finding of a taking on the premise that appellees had a fully adequate remedy by virtue of the suit they had filed against Iran in federal district court in July 1980 and the pre-judgment attachments they obtained in that suit, and that they therefore realized no benefit from the claims-settlement process established by the Algiers Accords. However, the court of appeals' reliance on the attachments is inconsistent with this Court's holding in *Dames & Moore* that the voiding of the attachments as part of the settlement with Iran did *not* give rise to a taking claim because the attachments were "in every sense subordinate to the President's power under the IEEPA" to void the attachments and transfer the assets out of the United States to resolve the crisis (453 U.S. at 674 n.6). Moreover, suits by claimants in United States courts offered no certain means of recovery, because many claimants encountered jurisdictional and procedural obstacles to their suits against Iran. It is true that if appellees' suit in federal district court had been permitted to proceed to judgment, there would have been no statutory authorization for deduction of a 1½% fee from that judgment. But appellees had no *property* right to have their claims adjudicated in a United States court or in a cost-free forum. To the contrary, laws regulating judicial jurisdiction and procedure, like other regulatory measures, are subject to amendment by the legislature, and amendments may be applied to pending cases.

Appellees are also wrong in asserting that they realized no benefit from the claims-settlement process established by the Algiers Accord. The Award on Agreed Terms that was entered by the Tribunal at their request must be given "final and binding" effect under the Accords, and it was enforceable against Iran in the courts of any nation under its laws—attributes that a settlement agreement alone would not have had. Entry of the award by the Tribunal also enabled appellees to receive payment

out of the Security Account, through the special offices of the Federal Reserve Bank, thereby eliminating the risks, costs, and delays that might have been associated with an effort to collect directly from Iran. Appellees are also wrong in their assertion that no fee should be charged because the President treated their claims as mere "bargaining chips" to obtain the release of the hostages. Although the President would have been free under IEEPA to transfer all frozen Iranian assets directly to Iran in return for release of the hostages, he instead used those assets as leverage to persuade Iran to settle the claims of United States nationals and to deposit some of the frozen assets in a Security Account for the payment of meritorious claims.

D. The insubstantiality of appellees' taking claim also is apparent if Section 502 is viewed from the broader perspective of the overall effect that the claims-settlement mechanism had on appellees' claims, taking into account the three factors the Court has found to be of particular significance in its "regulatory taking" cases. Applying those factors in this case: (1) the economic effect of the 1½% fee is very small; (2) assessment of the fee did not interfere with reasonable investment-backed expectations, because those who engage in foreign commerce necessarily assume the risk that the President might find it necessary to exercise his claims-settlement authority and because fees have typically been assessed against successful claimants when he does so; and (3) the character of the government action—a "user fee"—is far removed from the concerns of the Just Compensation Clause.

III. Appellees' due process objections to Section 502 are without merit. Congress had a rational basis for giving Section 502 a retroactive effective date of June 7, 1982. That was the date on which the Treasury Department issued the directive license under the Independent Offices Appropriations Act, which imposed a user fee of 2%. Making Section 502 effective as of that time served to cure the technical defects the Claims Court had identified in the directive license and to assure that all successful claimants would be treated alike. Similarly, Congress had a rational basis for assessing a fee only against successful claimants: imposition of a filing fee on all claimants might have

deterred some claimants from seeking to resolve their claims through the Tribunal; Congress reasonably could determine that only successful claimants realized a sufficient benefit from the Algiers Accords to justify a requirement that they pay ~~part~~ a portion of the costs; and charging only successful claimants is consistent with past practice.

IV. The Senate's addition of Section 502 to the foreign relations authorization bill passed by the House did not violate the constitutional requirement that "All Bills for raising Revenue shall originate in the House of Representatives" (Art. I, § 7, Cl. 1). That Clause has consistently been construed to apply only to bills that raise revenues for the general operation of the government, not to bills that impose a fee to reimburse the government for specific services rendered or for the cost of administering a regulatory program.

ARGUMENT

CONGRESS HAS THE CONSTITUTIONAL AUTHORITY TO IMPOSE A FEE UPON UNITED STATES CLAIMANTS WHO RECEIVE AN AWARD FROM THE IRAN-UNITED STATES CLAIMS TRIBUNAL, IN ORDER TO REIMBURSE THE UNITED STATES FOR THE COSTS IT INCURS IN CONNECTION WITH THE ARBITRATION AND PAYMENT OF SUCH CLAIMS

I. SECTION 502 IMPOSES A REASONABLE "USER FEE" AS AN INCIDENT TO THE EFFECTUATION OF THE PRESIDENT'S AUTHORITY TO SETTLE CLAIMS AGAINST FOREIGN GOVERNMENTS AND CONGRESS'S AUTHORITY TO REGULATE COMMERCE WITH FOREIGN NATIONS

Section 502 of the Foreign Relations Authorization Act for Fiscal Years 1986 and 1987 requires the Federal Reserve Bank of New York to deduct and pay into the United States Treasury 1½% of an award that is made by the Iran-United States Claims Tribunal in favor of a United States claimant and is paid out of the Security Account established by the Algiers Accords. The 1½% fee is but one aspect of the comprehensive and complex

regulatory regime established by the Algiers Accords, implementing international and financial agreements, Executive Orders, Treasury Department regulations, the procedural rules of the Iran-United States Claims Tribunal, and the Iran Claims Settlement Act itself—all for the purpose of resolving claims of United States nationals against Iran and its governmental entities. These measures were instituted to serve governmental interests of the most compelling order.

A. The Algiers Accords of course were intended in part to bring about the release of the Americans who had been taken hostage at the United States Embassy in Tehran more than a year earlier. But the Algiers Accords are also a concrete manifestation of the persistent efforts by the United States to afford its nationals an opportunity for resolution of their claims against Iran, which totalled several billion dollars. In fact, the President made it clear when Iranian assets in the United States were frozen on November 14, 1979, that the blocking order was issued "in response to reports that the Government of Iran [was] about to withdraw its funds" from the jurisdiction of the United States and that the purpose of the order was "to ensure that claims on Iran by the United States and its citizens are provided for in an orderly manner" (15 Weekly Comp. Pres. Docs. 2117 (Nov. 14, 1979)). In this respect, the President's actions were consistent with the historic use of blocking orders and one of the principal purposes of IEEPA: "to put control of foreign assets in the hands of the President" (*Propper* v. *Clark*, 337 U.S. 472, 493 (1949)), and thereby to give him leverage to bring about a settlement of individual claims, which in turn could be paid out of the frozen assets. See *Dames & Moore*, 453 U.S. at 673-674; *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 412, 431 (1964); *Zittman* v. *McGrath*, 341 U.S. 446, 454 (1951).

This Court, in *Dames & Moore*, sustained the various actions of the President under the Algiers Accords, which fell into two discrete categories: (i) lifting the blocking order, revoking the license for United States claimants to obtain pre-judgment attachments of Iranian assets, and directing the disposition of the frozen Iranian assets, including to the Security Account; and (ii) providing for the arbitration of claims by United States claim-

ants againt Iran by the Tribunal, with meritorious claims to be paid out of the Security Account. The Court held that the former actions were expressly authorized by IEEPA (453 U.S. at 669-674) and that the settlement of claims, through arbitration or otherwise, is a long-established aspect of the President's foreign relations powers under Article II of the Constitution (*id.* at 675-683).

The Court there recognized that claims by the nationals of one country against the government of another are often "sources of friction" between the two sovereigns. *Dames & Moore*, 453 U.S. at 679; see also *United States* v. *Pink*, 315 U.S. 203, 225 (1942). When such claims are "kept alive," they may imperil the existence of amicable diplomatic relations, or indeed of any relations at all, and may "vex the peace of nations" (*Pink*, 315 U.S. at 232-233; *Ozanic* v. *United States*, 188 F.2d 228, 231 (2d Cir. 1951)). In order to eliminate these sources of friction, the President, on behalf of the United States, has often entered into agreements with foreign sovereigns settling the claims of their respective nationals. *Dames & Moore*, 453 U.S. at 679; *Belk* v. *United States*, 858 F.2d 706, 709 (Fed. Cir. 1988). Typically, the United States has agreed to renounce or extinguish the claims of its nationals against the foreign sovereign in exchange for a lump-sum payment or the establishment of arbitration procedures for individualized adjudication of the claims. *Dames & Moore*, 453 U.S. at 679-680 (citing 10 lump-sum settlement agreements entered into by the President since 1952); 79 Cong. Rec. 969-971 (1935) (listing 40 Executive Agreements entered into between 1842 and 1931 that provided for arbitration of claims against foreign sovereigns).

Congress has endorsed and facilitated the President's efforts to resolve claims against foreign governments and to establish procedures for distributing funds to United States claimants. For example, Congress in 1935 created a Special Mexican Claims Commission to determine claims against the Republic of Mexico and enter final awards on behalf of United States claimants. Special Mexican Claims Commission Act, ch. 55, §§ 1-12, 49 Stat. 149-151. More recently, Congress enacted the International Claims Settlement Act of 1949, 22 U.S.C. 1621-1664m,

which establishes the Foreign Claims Settlement Commission and charges it with making final and binding decisions on claims by United States nationals against foreign governments. Claims found by the Commission to be meritorious may then be paid on a pro rata basis out of a lump sum settlement with the foreign nation, should the President subsequently negotiate one. See 22 U.S.C. 1623(a); *Dames & Moore*, 453 U.S. at 680.

B. When the President enters into a settlement of the claims of United States nationals against a foreign government, he not only furthers the interests of the Nation as a whole in removing sources of friction with another nation; he also substantially furthers the private interests of individual claimants in obtaining an adjudication of their claims and payment of those claims that are found to be meritorious. This point is illustrated by experience under the Algiers Accords. The President reported to Congress in his most recent semi-annual report under IEEPA that as of September 30, 1988, payments out of the Security Account to successful United States claimants totalled $1.073 billion. 24 Weekly Comp. Pres. Docs. 1502, 1503 (Nov. 15, 1988). Moreover, as of September 30, 1988, Iran had replenished the Security Account on 21 occasions when its balance fell below the $500 million minimum required by the Algiers Accords. *Ibid.*[16] Experience has thus confirmed this Court's observation in *Dames & Moore* that "there does appear to be a real 'settlement' here" (453 U.S. at 687).

In recognition of the distinct benefit conferred on private claimants by the government's resolution of their claims against foreign governments, Congress repeatedly has provided for the United States to deduct 5% from payments of awards by the Foreign Claims Settlement Commission out of lump-sum settle-

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[16] Thus far, Iran has chosen to replenish the Security Account out of funds contained in a separate escrow account in which interest earned on the Security Account has been deposited. 24 Weekly Comp. Pres. Docs. at 1503. The establishment of a separate escrow account for the interest was the result of a Tribunal decision addressing Iran's claim that interest earned on deposits in the Security Account should be paid directly to Iran, rather than retained in the Security Account. See *The Islamic Republic of Iran* v. *United States*, Dec. No. 12-A/1-FT, at 5 (Aug. 3, 1982); *1985 Hearing* at 20-21.

ments negotiated by the President. That amount serves to reimburse the United States for expenses incurred in the Commission's adjudication of the claims and the President's settlement with the foreign nation. See, *e.g.*, 22 U.S.C. 1641a(a), (Bulgaria, Hungary, Rumania, Italy, and the Soviet Union), 1644g (East Germany), 1645h(b) (Vietnam). The 1½% fee deducted from awards by the Iran-United States Claims Tribunal is consistent with this pattern (although Section 502 assesses a f at a much lower rate), and Congress in fact drew upon the experience under the International Claims Settlement Act when it enacted Section 502. See *1985 Hearing* at 15, 27-28, 71, 106-107; see also *1983 Hearing* at 8, 26, 28; *1982 Hearing* at 28-29, 31. There can be no doubt that Congress has the constitutional authority to assess such a fee.

The Iran Claims Settlement Act, including Section 502, represents an exercise by Congress of its power "To regulate Commerce with foreign Nations" (Art. I, § 8, Cl. 3)—in this case, by ratifying the mechanism instituted by the President for resolving and paying the claims of United States nationals who engaged in foreign commerce with Iran and for recovering the costs incurred by the United States in supporting that mechanism. The Iran Claims Settlement Act also is a "necessary and proper" means for "carrying into Execution" the power that is vested in the President by the Constitution (and was confirmed by this Court in *Dames & Moore*) to settle claims of United States nationals against a foreign nation. See Art. I, § 8, Cl. 18.

It is well established that, in exercising its power to regulate foreign commerce, Congress may impose a fee upon those engaging in that commerce, in order to defray the government's costs of regulating the activity or societal costs generated by it. For example, in the 1880s, Congress imposed upon owners of ships bringing passengers into the United States a fee of 50 cents for every passenger who was not a citizen of the United States. The purpose of the fee was to defray the expense of regulating immigration and furnishing care to immigrants arriving in the United States. This Court sustained the fee in the *Head Money Cases*, 112 U.S. 580, 589-590 (1884), finding that the burden imposed on the ship owners was "the mere incident of the regulation of commerce—of that branch of foreign commerce which is involved in immigration"—and that "[t]he money thus raised * * * constitutes a fund raised from those who are engaged in the transportation of these passengers, and who make profit out of it, for the temporary care of the passengers whom they bring among us" (*id.* at 595-596). Thus, "it was competent for Congress to impose this contribution on the ship owner engaged in that business" (*id.* at 596).

Here, appellees likewise elected to engage in foreign commerce by entering into trade with Iran, a foreign sovereign (J.S. App. 13a). They necessarily did so with the awareness that the conduct of their activities and the resolution of any ensuing disputes might be affected by events beyond their control in Iran and might come to depend upon the fabric of relationships maintained by the United States with Iran and upon measures undertaken by the two nations if those relationships deteriorated. In particular, appellees and other United States nationals entered into and performed their contracts with the Iranian Government in full recognition of the possibility that the President might later find it necessary—in the interests of appellees and others doing business with Iran, as well as the Nation as a whole—to invoke his established authority under the Constitution to settle any claims arising out of their course of dealing with Iran. It is entirely appropriate for Congress to pass a portion of the costs of the claims-settlement effort through to the private claimants, both because the measures instituted by the President redound to the private benefit of individual claimants and because those measures serve to eliminate the adverse effects that unresolved private claims may have for the Nation as a whole in its relations with the foreign sovereign. Assessment of a fee therefore represents a reasonable exercise by Congress of its enumerated power to regulate foreign commerce, as in the *Head Money Cases*, and its power under the Necessary and Proper Clause to effectuate the President's claims-settlement authority under the Constitution.

Despite the manifest reasonableness of assessing a fee in these circumstances and Congress's constitutional authority under Article I to impose it, appellees contend that Section 502 violates specific limitations on Congress's authority under the Just Compensation, Due Process, and Origination Clauses of the Constitution. As we show below, each of these objections is without merit.

II. SECTION 502 DOES NOT RESULT IN A TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION

Appellees first contend that Section 502 is unconstitutional because it results in a taking of private property for a public use, without just compensation, in violation of the Fifth Amendment of the Constitution. Significantly, however, the theory of appellees' taking claim is not that the $2.8 million awarded by the Tribunal—or even the net amount of $2.758 million paid by the Federal Reserve Bank—is less than the amount they would have been awarded on the same claim by the United States District Court for the District of Columbia. Indeed, because appellees entered into a settlement with Iran, rather than seeking an adjudication by the Tribunal, they are estopped from contending that the amount awarded by the Tribunal is inadequate. Instead of focusing their taking claim on the overall result of submitting their claims to the settlement process established by the Algiers Accords (compare *Duquesne Light Co.* v. *Barasch*, 109 S.Ct. 609 (1989)), appellees address their taking claim narrowly to one component of that process: the deduction of 1½% of the payment made to satisfy an award by the Tribunal. By urging that the deduction amounts to a per se taking measured by the amount of the fee, appellees are effectively contending that the Fifth Amendment's Just Compensation Clause entirely negates—by offset—the authority of Congress under Article I to impose the fee. Contrary to appellees' contention, however, the assessment of a reasonable fee for the use of the claims-settlement mechanism established by the Algiers Accords does not violate the Just Compensation Clause.

A. THE CHARGING OF A REASONABLE FEE TO THOSE WHO UTILIZE OR BENEFIT FROM GOVERNMENTAL SERVICES DOES NOT VIOLATE THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT

The deduction of 1½% from the amount awarded by the Tribunal in favor of United States claimants was specifically intended by Congress to reimburse the United States for the costs it incurs in connection with the arbitration and payment of the claims of United States nationals against Iran. The deduction is, in other words, a "user fee" assessed against those claimants who have successfully availed themselves of the extraordinary procedures established by the President and approved by Congress for their benefit. Congress may impose a reasonable charge on those who utilize specific governmental services (cf. *Kadrmas* v. *Dickinson Public Schools*, 108 S.Ct. 2481 (1988)), including an adjudicatory tribunal (see *United States* v. *Kras*, 409 U.S. 434, 448-449 (1973)).[17] The assessment of such a fee in reimbursement for services rendered is not a "taking" of private property within the meaning of the Just Compensation Clause.

Although Section 502 imposes a user fee, not a tax, the principles this Court has announced in sustaining taxes against a Fifth Amendment challenge are relevant in this setting. In the case of general revenue measures, the Court consistently has held that the Fifth Amendment allows the government wide latitude in setting the appropriate level of taxation and does not

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[17] The Due Process Clause has been held to bar the government from imposing a filing fee as a condition precedent to obtaining a meaningful judicial hearing in the case of an indigent plaintiff who seeks adjudication of certain fundamental claims that are uniquely subject to public resolution. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). Neither appellees nor their contractual or other claims against Iran are protected by this special rule. Compare *United States* v. *Kras*, *supra*. In any event, the fee prescribed by the Iran Claims Settlement Act is assessed only in the event that the claimant prevails before the Tribunal. For this reason, and in light of the modest rate of the fee, Section 502 does not erect any substantial barrier to access to the Tribunal, and it therefore raises no procedural due process concerns.

require that the amount of taxes from a particular activity be reasonably related to the cost or value of the services provided by the government to that activity or to the taxpayer. *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 622 (1981); *Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369, 376-377 (1974); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 521-523 (1937); *A. Magnano Co.* v. *Hamilton*, 292 U.S. 40, 47 (1934); *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1, 24-25 (1916); *Billings* v. *United States*, 232 U.S. 261, 282-283 (1914); *McCray* v. *United States*, 195 U.S. 27 (1904); cf. *Skinner* v. *Mid-America Pipeline Co.*, slip op. 11. In fact, in *Penn Central Transportation Corp.* v. *New York City*, 438 U.S. 104 (1978), the Court identified "[e]xercises of the taxing power" as an "obvious example" of the government's power to "execute laws or programs that adversely affect recognized economic values" (*id.* at 124). Similarly, in its discussion in *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470 (1987), of the "reciprocity of advantage"[18] that supports certain regulatory restrictions on the use of property, the Court observed (*id.* at 491 n.21):

> The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received.

See also *Cotton Petroleum Corp.* v. *New Mexico*, No. 87-1327 (April 25, 1989), slip op. 24-26; *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870).

It follows *a fortiori* from these Fifth Amendment principles applicable to general revenue measures that the assessment of

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[18] See *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922); see also *Hodel* v. *Irving*, 481 U.S. 704, 715 (1987).

the tailored user fee at issue in this case does not violate the Fifth Amendment. Congress set the fee at a level that it believed would sufficiently reimburse the United States for a portion of the approximately $4 million in expenditures it was expected to incur annually in connection with the operation of the Tribunal, maintenance of the Security Account, payment of awards through the Federal Reserve Bank of New York, and the rendering of assistance to United States claimants. Although the Just Compensation Clause would not in any event require a close correlation between the level of the fee and the cost of the services, neither the court of appeals nor appellees have disputed Congress's determination that the fee constitutes "a fair approximation of the cost of benefits supplied" (*Massachusetts* v. *United States*, 435 U.S. 444, 463 n.19 (1978)). Moreover, especially when compared with ordinary taxes, the amount of the fee is, as appellees concede (Mot. to Dis. or Aff. 14, 17, 19), quite "modest[]" and "minimal," reflecting only a "small percentage[]" of Tribunal awards. Because the United States is simply passing on the reasonable cost of a government program that redounds to the special benefit of a relatively few persons, Section 502 plainly does not " 'forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 318-319 (1987), quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

B. THE DEDUCTION OF 1½% OF TRIBUNAL AWARDS PAID THROUGH THE FEDERAL RESERVE BANK OF NEW YORK IS A REASONABLE MEANS OF COLLECTING A VALID USER FEE AND IS NOT A PER SE TAKING ANALOGOUS TO A PHYSICAL APPROPRIATION OF PROPERTY

The court of appeals did not dispute the general proposition that the United States may charge a fee to those who utilize or benefit from services furnished by the government and that the imposition of such a fee does not result in an unconstitutional taking of private property without payment of just compensation. The court nevertheless concluded that deduction of the 1½% fee from the Tribunal's award before it was paid to appellees constituted a permanent physical "appropriation" of the $42,000 in question, thereby triggering the per se taking analysis of *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (J.S. App. 5a-7a). The court's reliance on *Loretto* was mistaken.

1. The Federal Reserve Bank's deduction of $42,000 from the aggregate amount of the Tribunal's award was merely the *means* by which the United States collected the user fee from appellees, just as an employer's withholding of income taxes from an employee's pay is the means by which the government collects those taxes. See *Slodov* v. *United States*, 436 U.S. 238, 242-244 (1978); *United States* v. *American Friends Service Comm.*, 419 U.S. 7, 10 & n.6 (1974); *Railroad Co.* v. *Jackson*, 74 U.S. (7 Wall.) 262, 269 (1868). If the assessment of a fee for services rendered is constitutional, as it clearly is, then the deduction of the fee prior to the Bank's distribution of the award to appellees raises no distinct constitutional difficulties. Compare *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines*, 405 U.S. 707, 714-715 (1972); *Robinson* v. *A & M Electric, Inc.*, 713 F.2d 608, 609 (10th Cir. 1983).[19]

[19] In *Loretto*, by contrast, there was no suggestion that persons who engaged in the regulated activity (the leasing of apartments) realized a benefit or generated a burden for society that justified the permanent physical occupation resulting from the ordinance that required owners of apartment buildings to permit cable television companies to install cables on their buildings. There was, in other words, no element of exchange or quid pro quo. Compare *Nollan* v. *California Coastal Comm'n*, 107 S.Ct. 3141, 3146 n.2, 3148 (1987). Nor was the physical invasion of real property in *Loretto* independently justified as a reasonable means to accomplish a distinct and lawful governmental purpose.

Congress could have provided by statute (or Iran and the United States could have provided in the Algiers Accords) that a claimant must pay a fee upon the filing of a claim with the Tribunal or upon the occurrence of other steps in the claims-resolution process, such as upon the Federal Reserve Bank's receipt of the payment of an award. Under such a scheme, it could not seriously be maintained that the United States had physically "appropriated" the private property of the claimant by requiring that the claimant pay the fee before receiving its payment from the Bank. The result should be no different here simply because the United States has chosen to assure collection of the fee in advance by directing that it be withheld from the award.

2. The underlying justification for the exaction also demonstrates why the court of appeals erred in relying (J.S. App. 6a, 9a) on the Court's application of a similar per se taking analysis in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980). In that case, the purchaser of a corporation deposited funds with the clerk of the county court to ensure payment of debts owed by the acquired corporation, and the clerk then deposited the funds in an interest-bearing account. When a receiver was appointed for the acquired company, the clerk paid the receiver the balance of the principal in the account, less the fee prescribed by another statutory provision (Fla. Stat. § 28.24(14) (1977)) for the clerk's services; the clerk did not, however, pay the receiver the interest that had been earned on the deposited funds. 449 U.S. at 156-158. This Court held that the county's retention of the interest was an unconstitutional taking of private property for a public use without payment of compensation (*id.* at 162-165). The Court's holding, however, expressly rested upon the premise that the interest earned on the deposited funds "was *not* a fee for services," because "any services obligation to the county was paid for and

satisfied by the substantial fee charged pursuant to § 28.24 and described specifically in that statute as a fee 'for services' by the clerk's office" (*id.* at 162 (emphasis added)). The Court also stressed that "no police power justification [was] offered for the deprivation" and that because "[n]either the statute nor appellees suggest[ed] any reasonable basis to sustain the taking of the interest," the "state statute ha[d] the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry" (*id.* at 163, 164).

In this case, by contrast, the 1½% deduction from the aggregate amount of a Tribunal award plainly *is* a fee for services, and unlike the situation in *Webb's Fabulous Pharmacies,* there is no separate statute under which such a fee is also assessed. Moreover, the assessment of the fee is an integral component of the overall scheme for the arbitration and payment of claims against Iran that were a legitimate subject of governmental regulation. As a result, and again in contrast to *Webb's Fabulous Pharmacies,* the exaction in this case is independently supported by important governmental interests; it is not a naked and unexplained appropriation of a portion of a claimant's private property for public use. Indeed, far from undermining the validity of Section 502, *Webb's Fabulous Pharmacies* supports the constitutionality of that provision, because the Court there recognized that the government may impose a fee on those who invoke an adjudicatory process furnished by the government.

3. Application of the per se analysis of *Loretto* and *Webb's Fabulous Pharmacies* would be especially inappropriate in this case for the additional reason that the Iran Claims Settlement Act imposes a fee only on persons who *voluntarily* invoked both the jurisdiction of the Tribunal and the special payment mechanism furnished by the Security Account and the Federal Reserve Bank of New York. As the Court explained in *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987), the Court's ruling in *Loretto* was " 'very narrow' " and rested on the fact that cable television operators were given "compulsory access" to the private property (480 U.S. at 251, quoting 458 U.S. at 441).

Similarly, in *Webb's Fabulous Pharmacies,* the creditors of the acquired company, who were the beneficiaries of the interpleader account, had no control over the purchaser's decision to deposit the funds in the registry of the court (cf. 449 U.S. at 161-162). In *Florida Power,* by contrast, the Court stressed that the owners of the utility poles had voluntarily entered into leases with the cable operators, and the terms of those leases were then subject to traditional police-power regulation of commercial transactions, as long as the rates were not "confiscatory." 480 U.S. at 251-253. See also *Nollan* v. *California Coastal Comm'n,* 107 S.Ct. at 3146 n.2; *Bowen* v. *Gilliard,* 107 S.Ct. 3008, 3019, 3021 (1987); *Ruckelshaus* v. *Monsanto,* 467 U.S. 986, 1007 (1984).

The principles upon which the Court relied in *Florida Power* are fully applicable here. Appellees voluntarily invoked the jurisdiction of the Tribunal by filing their monetary claims against Iran. Furthermore, even after appellees and Iran formally agreed to a settlement, they did not eschew the claims-settlement and payment apparatus established by the Algiers Accords and implementing measures, as they were free to do. Instead, appellees joined with Iran in requesting the Tribunal to approve the settlement by entering an award upon agreed terms, and the Tribunal entered such an award.[20] Appellees evidently believed that such a formal award by the Tribunal would have certain advantages. See pages 38-39, *Infra.* Moreover, by the time that appellees and Iran signed the settlement agreement and requested the Tribunal to enter the award on July 8, 1982, the Treasury Department had already issued the directive license under the IOAA requiring the Federal Reserve Bank

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[20] In addition to the Tribunal case filed by appellees that is at issue here (No. 205), appellee Sperry filed another case with the Tribunal (No. 191). Appellee likewise settled the various claims at issue in Case No. 191. However, appellee and Iran chose not to embody that settlement in a Tribunal award upon agreed terms. Instead, they requested the Tribunal to terminate arbitral proceedings in light of the settlement of the underlying claims, and the Tribunal granted that request. *Sperry Corp.* v. *The Islamic Republic of Iranian Navy, et al.,* Case No. 191 (Apr. 10, 1984). The decision by appellee Sperry to settle Case No. 191 outside the Tribunal mechanism demonstrates

to deduct 2% from any such award.[21] Appellees therefore were fully on notice that a fee would be deducted when they set the payment process in motion. Finally, as in *Florida Power*, it could not seriously be maintained in this case that the particular fee at issue, which is imposed at a maximum rate of 1½% of awards to successful United States claimants, is "confiscatory" in amount.[22]

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that an alternative avenue was available to appellees in the case at issue here, but that they perceived an advantage to having the Tribunal enter an award upon agreed terms.

[21] Appellees argue (Mot. to Dis. or Aff. 7 & n.12) that they actually "reached a settlement" with the Iranian respondents in Case No. 205 in February 1982, and that the Iranian Government gave its "final approval" to the agreement on July 8, 1982. However, the Tribunal's Award on Agreed Terms states that appellees and Iran "entered into a Settlement Agreement on 8 July 1982" (J.A. 20). Moreover, the joint request submitted by appellees and Iran to the Tribunal states that they had "entered into a Settlement Agreement date [*sic*] July 8, 1982, a copy of which is annexed hereto." Although the attached Memorandum of Understanding in turn states that it incorporates the "points of agreement" reached in February 1982, in Vienna, Austria," the Memorandum was not actually signed until July 8, 1982. Memorandum of Understanding at 1, 8. In addition, in their complaint in this case, appellees alleged that after filing its claim with the Tribunal, "Sperry simultaneously engaged in extensive settlement negotiations with the Iranian defendants and on July 8, 1982, Sperry settled its claims against the Iranians for the sum of $2.8 million" (J.A. 14). Finally, during hearings on the Iranian claims legislation, a representative of appellees stated that they had reached a "tentative settlement" in February 1982, but that it took "several months to obtain the approval of the Iranian government for the settlement" (*1983 Hearing* at 33).

Thus, although appellees appear to have reached a tentative agreement with persons negotiating on behalf of the Iranian government in February 1982, they did not formally enter into a settlement agreement until July 8, 1982. If appellees believed at that time that the assessment of the 2% user fee under the directive license issued on June 7, 1982, rendered the $2.8 million settlement figure inadequate, they could have declined to submit the settlement to the Tribunal and sought a greater amount from Iran. Moreover, appellees do not and cannot deny that they were on notice of the directive license at the time they joined with Iran in requesting the Tribunal to enter an award based on the settlement.

[22] We do not mean to suggest that a user fee or comparable assessment intended to reimburse the government for the cost of benefits conferred is valid only when it is levied against persons who voluntarily engaged in the activity

C. APPELLEES HAD NO VESTED CONSTITUTIONAL RIGHT TO HAVE THEIR CLAIMS AGAINST IRAN ADJUDICATED IN UNITED STATES COURTS OR IN A COST-FREE FORUM

The court of appeals also rested its finding of a taking on the premise that appellees had a fully sufficient remedy in the suit they had filed against Iran in July 1980 in the United States District Court for the District of Columbia, secured by the pre-judgment attachments of Iranian assets they had obtained in that suit in October 1980. The court then reasoned that because no fee would have been deducted from a judgment entered by the district court – and because the award by the Tribunal was a substitute for such a judgment – any reduction in the amount of the Tribunal's award constitutes a taking of property for which compensation must be paid. The court was also influenced by its further view that appellees received no benefit from the Tribunal and that the claims of appellees and other United States nationals were used by the government as "bargaining chips" to obtain the release of the hostages. J.S. App. 7a-11a. This reasoning is wrong in every respect.

1. The court of appeals relied principally upon the pre-judgment attachments as a basis for concluding that appellees had a fully adequate remedy against Iran in federal court prior to the time that the United States adhered to the Algiers Accords. See J.S. App. 7a, 8a, 9a; cf. *Dames & Moore*, 453 U.S. at 687. For several reasons, however, those attachments furnish no support for a taking claim.

The President froze Iranian assets in the United States in November 1979 in response to threats by Iran to remove its assets from the United States. See page 3, *supra*. It is very likely that if the President had not acted, those assets would not

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that received the benefit or who requested the government to perform the services. See, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 209 (1983) (discussing 25 U.S.C. 413, which authorizes the Secretary of the Interior to collect reasonable fees to cover the cost of work performed for Indian tribes or individual Indians); *Londoner* v. *Denver*, 210 U.S. 373, 378-379 (1908) (a city may levy an assessment against abutting property for improvements to a road even without the consent of the owners).

have remained in the United States, would not have been subject to whatever attachment and execution were otherwise permitted by United States law, and would not have been available to fund the Security Account for the ultimate payment of meritorious claims against Iran. Appellees' assertion that they received no assistance from the United States in pressing their claims against Iran ignores this protection afforded by the President to all United States claimants at the outset of the hostage crisis, some eight months before appellees filed suit in federal court.

Moreover, because appellees obtained their pre-judgment attachments only *after* the President had already frozen all Iranian assets in the United States, they were able to do so only by virtue of the license issued by the Secretary of the Treasury, which was expressly made revocable at any time. In other words, appellees' attachments were at all times "contingent" and "in every sense subordinate to the President's power under the IEEPA" to void the attachments and direct the transfer of the assets out of the United States, in order to resolve the international crisis. *Dames & Moore*, 453 U.S. at 673 & n.5, 674 n.6. In fact, the Court specifically held in *Dames & Moore* that a claimant "did not acquire any 'property' interest in its attachments of the sort that would support a constitutional claim for compensation," and that the President's revocation of the license permitting such attachments as part of the overall settlement with Iran did not constitute an unconstitutional taking of property without compensation. 453 U.S. at 674 n.6. Appellees' and the court of appeals' reliance on the pre-judgment attachments as an essential predicate for the taking claim in this case therefore is flatly inconsistent with *Dames & Moore*.

2. For the reasons just given, the taking question in this case must be analyzed as if appellees had never obtained pre-judgment attachments of Iranian assets in the United States. In the absence of that security, however, the bare filing of a lawsuit in federal district court did not afford appellees and other claimants any certainty that they would ultimately recover on their claims against Iran. United States nationals often faced a variety of obstacles to recovery against Iran in United States

courts. Those obstacles included arguments by Iran in individual cases that: (1) contacts with the United States were insufficient to support jurisdiction over the particular claim under the Foreign Sovereign Immunities Act of 1976 (FSIA) (28 U.S.C. 1605); (2) the Act of State doctrine barred adjudication of expropriation and certain other claims; (3) the contracts on which American claimants sought to recover provided for resolution of disputes in other forums;[23] and (4) Iranian assets that might secure a final judgment were in any event immune from pre-judgment attachment under the FSIA (28 U.S.C. 1609) because they belonged to Iran's central bank or military (28 U.S.C. 1611(b)), because Iran had not explicitly waived its immunity to pre-judgment attachment, or because the assets did not belong to the Iranian entity against which the plaintiff had a claim (28 U.S.C. 1610). See *Iran Asset Settlement: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong., 1st Sess. 42 (1981); *1985 Hearing* at 70, 123. In fact, this Court observed in *Dames & Moore* that because the Algiers Accords "remov[ed] a number of jurisdictional and procedural impediments faced by claimants in United States courts," the government's argument that "the provision of the Claims Tribunal will actually *enhance* the opportunity for claimants to recover their claims * * * cannot be discounted" (453 U.S. at 687 (emphasis in original)).

That observation is not without force here. The contracts underlying a number of appellees' claims against Iran and its

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[23] Certain contracts between United States nationals and the Iranian Government or its controlled entities that provide for resolution of disputes in Iranian courts are not within the Tribunal's jurisdiction under the Algiers Accords. Article II, Paragraph 1 of the Claims Settlement Declaration excludes from the Tribunal's jurisdiction "claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position" (J.A. 38). The Tribunal has interpreted this aspect of the Accords restrictively in its application to particular cases. *Gibbs & Hill, Inc.* v. *Iran Power Generation and Transmission Co. ("TAVANIR") of the Ministry of Energy of the Government of Iran, et al.*, ITL No. 1-6-FT, at 4 (Nov. 5, 1982); *Ford Aerospace* v. *The Air Force of the Islamic Republic of Iran*, ITL No. 6-159-FT, at 4 (Nov. 5, 1982).

governmental entities provided that all disputes arising out of the contract would be submitted to arbitration under the rules and regulations of the International Chamber of Commerce (ICC).[24] If those arbitration provisions were enforceable in United States courts, appellees had no assurance even prior to the United States' adherence to the Algiers Accords that they would have a remedy in United States courts on at least some of their claims. Compare *Mitsubishi Motors* v. *Soler Chrysler-Plymouth*, 473 U.S. 614, 628-631 (1985); *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974); see *1985 Hearing* at 123.

3. The court of appeals correctly observed that if appellees' suit against Iran had been permitted to proceed, existing law would not have provided for a deduction from a judgment of the district court in appellees' favor. Appellees, however, had no entitlement to have that existing law remain in effect and had no *property* right to that particular forum, or a cost-free forum, for the adjudication of their claims.

This Court has made it clear that statutes providing for the assessment of taxes and fees, like other regulatory measures, are subject to revision by Congress. See *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986); *National Railroad Passenger Corp.* v. *Atchison, T. & S.F.R.R.*, 470 U.S. 451, 465-470 (1985); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982); *Lynch* v. *United States*, 292 U.S. 571 (1934); *Crowell* v. *Benson*, 285 U.S. 22, 41 (1932); *Silver* v. *Silver*, 280 U.S. 117, 122-123, (1929). There is no reason why statutes regulating jurisdiction and judicial pro-

[24] See *Sperry Corporation & Sperry World Trade, Inc.* v. *Islamic Republic of Iran, et al.*, Case No. 205, Statement of Claim, Attachment A, at A-3, A-15 (§ 18); Attachment C, at C-3, C-18 (§ 18); Attachment D, at D-3, D-18 (§ 18); Attachment E, at E-1, E-77 (§ 24.1.5); Attachment F, at F-3, and Agreement, at 38 (§ 20.2); Attachment G, at G-3, G-47 (§ 20.2); Attachment K, at K-2, K-29 (§ 2.23); Attachment L, at L-3, L-43 (§ 2.3). Although several of these contract clauses refer to the rules and regulations of the ICC without specifically mentioning arbitration, such a reference would presumably be deemed sufficient under ICC rules to constitute an agreement to submit disputes to arbitration. See W. L. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration*, in *International Commercial Arbitration*, ch. 6 (June 1984).

cedure, including the assessment of costs, should be excluded from the application of those principles. The Just Compensation Clause therefore would not have barred Congress from enacting a law that imposed a user fee upon plaintiffs who invoked the jurisdiction of the federal district courts and then applying that statute to pending cases, including appellees' pending suit against Iran in the District Court for the District of Columbia. Compare *Bradley* v. *Richmond School Bd.*, 416 U.S. 696 (1974); cf. *Dames & Moore*, 453 U.S. at 685. It follows that the Just Compensation Clause likewise did not bar Congress from imposing a user fee upon those persons who invoked the alternative forum of the Iran-United States Claims Tribunal for adjudication of claims that they previously had brought (or might have brought) in federal district court.

Furthermore, it is by no means clear that appellees had a reasonable expectation prior to the Algiers Accords that all of their disputes with Iran would be presented to a cost-free forum. The rules of the International Chamber of Commerce, to which appellees had agreed to submit many of their claims, provide for the assessment of administrative expenses and the costs of the arbitrator against the parties as the arbitrator sees fit, guided by a table of fees and costs appended to the Rules. See ICC, *Rules of Arbitration and Court*, art. 20 & Table 9 (1980); see generally W.L. Craig, *et al.*, note 24, *supra*, ch. 3; T. de Hancock, *The ICC Court of Arbitration*, 1 J. Int'l Arb. 21, 31-33 (1984). Those rules contemplate a range of fees and costs of between approximately $30,000 and $70,000 for the arbitration of a claim in which the amount in dispute is $2.8 million, the total that appellees ultimately recovered from Iran (which was presumably less than the amount originally in dispute). As a result, if appellees' claims against Iran had been submitted to arbitration under ICC procedures, they might not have avoided the payment of a "user fee," as they now insist. And, indeed, the State Department relied on the precedent of the ICC's provisions for assessment of fees and costs when it supported the enactment of Section 502 in 1983. See *1983 Hearing* at 8.[25]

[25] Deputy Legal Adviser Michael J. Matheson stated:

> Like the [Foreign Claims Settlement] Commission, the Tribunal, the Security Account, and the supporting activities of U.S. agencies provide

4. Although appellees reached a settlement with Iran, it simply is not true, as the court of appeals suggested, that they received no benefit from the Tribunal and the other features of the claims-settlement apparatus established by the President pursuant to the Algiers Accords. The Accords themselves—as well as the availability of the Tribunal as a forum for adjudication of claims and the availability of the Security Account as a guaranteed source of payment—no doubt furnished both an initial impetus and a continuing incentive for Iran to negotiate concerning the settlement of appellees' individual claims. Beyond this, the formal award upon agreed terms, which the Tribunal entered upon the joint request of appellees and Iran, furnished appellees with a number of concrete advantages. Under the Accords, the award became "final and binding" upon Iran and was "enforceable against [Iran] in the courts of any nation in accordance with its laws" (J.A. 40)—attributes that a settlement agreement alone would not have had. Entry of the award also entitled appellees to receive payment out of the Security Account, through the channels established by the Federal Reserve Bank of New York as the fiscal agent of the United States, thereby eliminating the risks, costs, and delays that might have been associated with efforts by appellees to collect directly from Iran.[26] In addition, the United States' Agent

a special service to a special class of Americans. In fact, for private claimants, it is similar to other private arbitral bodies convened to adjudicate commercial disputes. These other bodies all charge for their services: the most inexpensive of them, the American Arbitration Association, charges $3,850 for a $1 million claim, while the most expensive, the International Chamber of Commerce, charges $13,250 for a $1 million claim.

See also *1983 Hearing* at 29 (statement of Lee Marks, Chairman, ABA Committee on Foreign Claims) (noting the ICC precedent of a sliding scale for fees).

[26] The principle that amounts owing by Iran under settlement agreements may be paid out of the Security Account if approved by the Tribunal in an award upon agreed terms was established by an interpretive decision rendered by the Tribunal on May 17, 1982. *The Islamic Republic of Iran* v. *United States*, Dec. No. 8-A/1-FT, at 12-13. State Department attorneys participated in the proceedings on the interpretive issue, urging the result that the Tribunal ultimately reached. *1985 Hearing* at 20. These efforts by government personnel, which Section 502 is designed to reimburse, obviously redounded to the benefit of appellees.

at The Hague has furnished extensive assistance to United States nationals in preparing for settlement negotiations and other aspects of the arbitration process, and the Tribunal itself also furnishes assistance to claimants.[27]

5. Finally, the court of appeals, like appellees (see Mot. to Dis. or Aff. 15, 16, 22), seriously misinterprets the historical record in asserting that the President treated the claims of appellees and other United States nationals as nothing more than "bargaining chips" to obtain the release of the American hostages and that the public therefore should bear all of the government's expenses associated with the arbitration and payment of those claims. The President, of course, would have had the discretion under IEEPA to transfer all frozen Iranian assets in the United States directly to Iran solely to obtain the release of the hostages, without assuring the availability of any of those assets to pay American claimants and without taking any steps to resolve those claims. But that is not what the President did. He provided for the retention of $1 billion in Iranian assets in the Security Account to pay American claims against Iran, secured a commitment from Iran to replenish that account whenever its balance dropped below $500 million, and established an international forum for the adjudication of claims. The effectiveness of that alternative forum for claimants is demonstrated by the fact that the Tribunal has now awarded in excess of $1 billion to United States claimants. And of course appellees themselves received an award in an amount ($2.8 million) to which they agreed from the very Tribunal whose role they now seek to minimize. Appellees' own experience suffi-

[27] See Iran—United States Claims Tribunal, *Annual Report for the Period Ending 30 June 1988*, at 21, 38 (Dec. 15, 1988); S. Belland, *The Iran-United States Claims Tribunal: Some Reflections on Trying A Claim*, 1 J. Int'l Arb. 237, 239, 246 (1984); B. Clagett, *The Iran-United States Claims Tribunal: A Practitioner's Perspective*, in *The Iran-United States Claims Tribunal 1981-1983*, at 129, 134 (R. Lillich ed. 1984); E. Lauterpacht, *The Iran-United States Claims Tribunal—An Assessment*, in *Private Investors Abroad—1982*, at 213, 227-228 (1982).

ciently refutes the suggestion that their claims were effectively traded away as "bargaining chips."

D. THIS COURT'S "REGULATORY TAKING" CASES FURTHER SUPPORT THE CONSTITUTIONALITY OF SECTION 502

The foregoing submissions are sufficient to sustain the user fee imposed by Section 502 and to dispose of appellees' taking challenge in this case. There accordingly is no need for the Court to resort to the factors it has identified for purposes of considering taking challenges to regulatory measures that adversely affect property interests.

However, although appellees focus their taking challenge narrowly on Section 502's directive that a portion of their Tribunal award be paid into the United States Treasury, the validity of the fee may also be evaluated in a broader context. This is so because the fee appellees challenge was not assessed in isolation, and Section 502 does not direct the seizure of funds that appellees and other claimants already have in hand. Section 502 instead assesses a fee as part of regulatory framework that may be said to regulate a species of private property—the claims of United States nationals against Iran—by prescribing the manner in which those claims may be presented, resolved, and paid. The Court therefore may find it prudent to consider the reasonableness of the fee from the broader perspective of the effect that the overall claims-settlement regime established by the Algiers Accords has had on the claims of appellees and other United States nationals. In that event, the Court might choose to draw, at least for purposes of analogy, on some of the factors it has considered in its "regulatory taking" cases.

In "regulatory taking" cases, the Court has not established " 'any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action must be deemed a compensable taking.' " *Ruckelshaus* v. *Monsanto*, 467 U.S. 986, 1005 (1984), quoting *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979), and *Penn Central*, 438 U.S. at 124. Rather, "[t]he inquiry into whether a taking has occurred is

essentially an 'ad hoc, factual' inquiry." *Monsanto*, 467 U.S. at 1005, quoting *Kaiser Aetna*, 444 U.S. at 175. Accord, *Pennell* v. *City of San Jose*, 108 S.Ct. 849, 856 (1988); *Gilliard*, 107 S.Ct. at 3020; *Hodel* v. *Irving*, 481 U.S. 704, 713-714 (1987); *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986). The judicial inquiry, however, is guided by three factors the Court has found to be of " 'particular significance": (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." ' " *Gilliard*, 108 S.Ct. at 3020, quoting *Connolly*, 475 U.S. at 224-225, and *Penn Central*, 438 U.S. at 124. Consideration of those factors here strongly confirms the conclusion that Section 502 does not effect an unconstitutional taking.

First, as the Claims Court noted (J.S. App. 16a-17a), the economic effect of the 1½% percent fee here is "very small" and is far less than that involved in many of this Court's regulatory taking cases. See, *e.g.*, *Gilliard*, 108 S.Ct. at 3020; *Penn Central*, 438 U.S. at 125-126, 131; *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915); compare *Keystone Bituminous Coal*, 480 U.S. at 496-497.

Second, appellees did not suffer any interference with reasonable investment-backed expectations. The possibility that the President would find it necessary to intervene in the resolution of financial and other disputes in the area of foreign commerce and foreign affairs is properly recognized as both a shared benefit and a shared risk of those who trade and travel abroad. See *Dames & Moore*, 453 U.S. at 679; *Chang* v. *United States*, 859 F.2d 893, 897 (Fed. Cir. 1988); *Shanghai Power Co.* v. *United States*, 4 Cl. Ct. 237, 245 (1983), aff'd, 765 F.2d 159 (Fed. Cir.) (Table), cert. denied, 474 U.S. 909 (1985); compare *Gilliard*, 107 S.Ct. at 3020-3021; *Connolly*, 475 U.S. at 226-227; *Penn Central*, 438 U.S. at 125-127.[28] Furthermore, there was no statutory provision that afforded appellees a property interest in

[28] Indeed, another panel of the Federal Circuit held that the Algiers Accords' total extinguishment of claims against Iran by the American hostages did not interfere with "distinct investment-backed expectations." *Belk* v. *United States*, 858 F.2d 706, 710 (1988).

having their claims against Iran adjudicated in a United States court or in a cost-free forum. See *Monsanto*, 467 U.S. at 1008-1010.

Third, as we have explained, the character of the governmental action—the assessment of a fee to defray the cost of performing identifiable governmental functions that redound to the special benefit of the persons who pay the fee or eliminate the harmful effects of the activities of those persons—strongly supports the constitutionality of Section 502. In fact, the United States routinely has deducted 5% from monies distributed to its nationals following the lump-sum settlement of their claims against foreign governments, as reimbursement of the United States' costs associated with the settlements. See pages 21-22, *supra*. That established practice negated any reasonable expectation by appellees that they would be exempt from bearing a portion of the cost of implementing whatever settlement might affect claims arising out of their business in Iran. See *Connolly*, 475 U.S. at 227; *Monsanto*, 467 U.S. at 1006-1007. See also, M. Ball & L. Harris, *Iranian Claims Settlement: A Guide for Commercial Claimants*, BNA, *Corporate Practice Series* at p. 12 (Supp. July 14, 1981) (anticipating that "[t]he United States may seek partial reimbursement for its share from claimants, perhaps in the form of a filing fee").

Appellees, like numerous other claimants, received significant benefits from their invocation of the Tribunal's jurisdiction and their election of the Security Account as the source of payment of their claims. The Fifth Amendment's command of "justice and fairness" does not require the government, and therefore the people at large, to shoulder the costs the government has incurred in making those special avenues of relief available to appellees and other claimants. It does not matter for these purposes that the settlement of private claims pursuant to the Algiers Accords was one component of a larger agreement with Iran that served the interests of the Nation as a whole. "[W]here, as here, the private party is the particular intended beneficiary of the government activity * * * [no taking occurs] even though the activity may be intended incidentally to benefit the public" (*National Board of Young Men's Christian Ass'n* v. *United States*, 395 U.S. 85, 92 (1969)).

III. SECTION 502 DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

As an alternative ground for affirmance of the judgment below, appellees contend (Mot. to Dis. or Aff. 23-28) that Section 502 violates the Due Process Clause of the Fifth Amendment in two respects: first, because it was given a retroactive effective date of June 7, 1982, and, second, because it imposes a fee on successful but not unsuccessful claimants. Each of these objections is insubstantial.

A. "It is now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way" (*Pension Benefit Guaranty Corp.* v. *Gray & Co.*, 467 U.S. 717, 729 (1984); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)). Such a statute must be sustained against a due process challenge if Congress had a "rational basis" for its actions. *Gilliard*, 107 S.Ct. at 3015-3016. To be sure, " '[t]he retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.' But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guaranty Corp.* v. *Gray & Co.*, 467 U.S. at 730, quoting *Turner Elkhorn*, 428 U.S. at 16-17. In this case, Congress's decision in 1985 to make Section 502 effective as of June 7, 1982, clearly had a "rational legislative purpose."

Congress made Section 502 effective as of June 7, 1982, because that was the date on which the Treasury Department issued its directive license under the IOAA that required a deduction from Tribunal awards in the amount of 2% in order to reimburse the United States for the costs it incurred in resolving claims against Iran. The effect of Congress's action was to ratify the Treasury Department's judgment that some fee should be imposed, although at a reduced rate of 1½%, and to cure (or render irrelevant) the technical defects the Claims Court's non-final oral ruling in the instant case had identified in the Treasury

Department's directive license under the IOAA (see J.S. App. 26a-51a). It is well settled that Congress may give legislation a retrospective effect in such circumstances. See *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 301-302 (1937); *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 426-430 (1931); *Charlotte Harbor & Northern R.R.* v. *Wells*, 260 U.S. 8, 11-12 (1922); *United States* v. *Heinszen & Co.*, 206 U.S. 370 (1907).

Appellees are quite wrong in asserting (Mot. to Dis. or Aff. 24-25) that Congress could not give retroactive effect to Section 502 because there was no prior legislative policy of assessing a fee in these circumstances and the statutory directive therefore constituted a novel and unanticipated development. The IOAA expressly states a legislative policy "that each service or thing of value provided by an agency * * * to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible" (31 U.S.C. 9701(a)). To that end, the IOAA authorizes the head of each agency to prescribe regulations establishing the charge for services or other things of value furnished by the agency; such charges must be "fair" and must be based on the cost to the government, the value of the service or thing to the recipient, the public policy or interest served, and other relevant facts (31 U.S.C. 9701(b)). The assessment of a fee against private persons who utilize and benefit from the claims-settlement mechanism that was established and funded by the United States falls squarely within the scope of this general policy, notwithstanding the particular defects in the application of that policy that the Claims Court perceived in its oral ruling concerning the Treasury Department's directive license. Moreover, in the specific context at issue here, Congress consistently has authorized the deduction of a percentage of awards made to United States nationals in settlement of their claims against foreign sovereigns as reimbursement for costs incurred by the United States with respect to such activities. See 22 U.S.C. 1626(b), 1641a(a). As a result, the June 7, 1982, effective date of Section 502 served to conform to, not depart from, historical practice.

Moreover, retroactive application of Section 502 ensured that all similarly situated claimants would be treated alike, because

the June 7, 1982, effective date was prior to the first payment of a Tribunal award. See *1985 Hearing* at 111. If Congress had assessed the fee only prospectively, the brunt of the fee might have been borne disproportionately by certain claimants, including those having small claims, for whom the arbitration process has been delayed. *1985 Hearing* at 111, 120. Thus, it was entirely rational for Congress to give Section 502 retroactive effect, and thereby to ratify the directive license (with modifications), in order to "provide uniform treatment" for all successful Tribunal claimants. *Connolly*, 475 U.S. at 223-227; *United States* v. *Darusmont*, 449 U.S. 292, 298-299 (1981); *Turner Elkhorn*, 428 U.S. at 16-19; *Swayne & Hoyt*, 300 U.S. at 302; compare *Nollan*, 107 S. Ct. at 3147 n.4.

B. Contrary to the suggestion by appellees and the court of appeals (J.S. App. 11a), the validity of the user fee in this case is not undermined by the fact that it is assessed only against those claimants who have actually received payment of an award by the Tribunal, rather than against all United States nationals who filed claims with the Tribunal. Where, as here, heightened scrutiny is not required, " '[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' " *Gilliard*, 107 S.Ct. at 3017, quoting *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970). Here, although a filing fee applicable to all claimants would also have been constitutional (compare *United States* v. *Kras*, 409 U.S. 434 (1973)), the legislative history unquestionably reveals a state of facts reasonably justifying imposition of a fee only on successful claimants.

First, the State Department informed Congress that if claimants (especially those whose claims were relatively small in amount) were charged a flat fee even if they did not ultimately prevail, they might be deterred from pursuing their claims through the Tribunal—a result that would be "contrary to the essential purpose of the Algiers Accords to provide a forum for the resolution of the claims of *all* U.S. nationals against Iran" (*1985 Hearing* at 113). Compare *Pennell*, 108 S. Ct. at 859.

Second, Congress reasonably could conclude that only those claimants who actually succeed in receiving an award from the

Tribunal realize a sufficient benefit from the overall claims-settlement program to warrant assessment of a fee. *1985 Hearing* at 109-110. As Congress also recognized, the approach embodied in Section 502 of charging only successful claimants for services rendered by the United States in facilitating the adjudication of their claims is consistent with the common practice in the legal profession for attorneys to charge a fee for their services that is contingent upon the client's recovery of a judgment or settlement amount from the defendant. *1985 Hearing* at 109. Moreover, although persons who filed claims with the Tribunal realized a benefit in the sense that they were afforded a forum for the adjudication of their claims, only successful claimants benefit from other components of the claims-settlement apparatus, such as the Security Account and the Federal Reserve Bank of New York. Cf. *Pennell*, 108 S.Ct. at 859.

Third, because Congress previously had recouped the costs of settling the claims of United States nationals only from awards made to successful claimants, it reasonably could conclude that the fairest course was to continue that practice here. Adherence to past practice was especially sound in light of the fact that appellees' claims arise out of their voluntary activities in an area of foreign commerce that is instinct with the possibility that the President might find it necessary to settle those claims. Compare *Connolly*, 475 U.S. at 228; *Monsanto*, 467 U.S. at 1006-1007.

The Constitution does not bar Congress from relying on these various common-sense distinctions in determining the incidence of a user fee. *Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369, 378-379 (1974); *Brushaber* v. *Union Pacific R.R.*, 240 U.S. 1, 24-26 (1916); *Billings* v. *United States*, 232 U.S. 261, 283-284 (1914); *McCray* v. *United States*, 195 U.S. 27, 61-62 (1904).

IV. SECTION 502 DOES NOT VIOLATE THE ORIGINATION CLAUSE BECAUSE IT IS NOT A "BILL FOR RAISING REVENUE" WITHIN THE MEANING OF THAT CLAUSE

In their final alternative ground for affirmance, appellees contend (Mot. to Dis. or Aff. 28-30) that, because Section 502

was added to the foreign relations authorization bill by the Senate, it contravenes the Origination Clause of the Constitution. That Clause provides: "All bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills" (Art. I, § 7, Cl. 1). This contention is equally insubstantial, however, because Section 502 is not a "Bill for raising Revenue" which must originate in the House.

As this Court has held, relying on Justice Story's analysis, "the practical construction of the Constitution and the history of origin of the constitutional provision in question proves that revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." *Twin City Bank* v. *Nebeker*, 167 U.S. 196, 202 (1897). Accord, *Millard* v. *Roberts*, 202 U.S. 429, 436-437 (1906); see also *United States* v. *Norton*, 91 U.S. 566, 568-569 (1875). In *Nebeker*, for example, the Court rejected an Origination Clause challenge to a provision in the law establishing a national currency secured by a pledge of bonds of the United States, which imposed a "tax" on notes in circulation in order to defray the costs of executing the statute. The Court held that the statute was "clearly not a revenue bill which the Constitution declares must originate in the House of Representatives," because the purpose of the "tax" was not to raise revenues for the general operation of the government. 167 U.S. at 202-203. See also *Millard*, 202 U.S. at 435-437 (assessment upon District of Columbia residents for public improvements not a tax within meaning of Origination Clause); *South Carolina* v. *Block*, 717 F.2d 874, 887 (4th Cir. 1983) (50-cent deduction imposed on proceeds of milk sales to defray cost of price-support program and reduce overproduction not a bill for raising revenue under Origination Clause).[29]

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[29] The Court has drawn a similar distinction between taxes and other sorts of fees or exactions in other cases involving challenges to measures that generated some income for the government. See *Massachusetts* v. *United States*, 435 U.S. at 451-463 (annual flat fee on all civil aircraft, including those owned by a state, to recoup part of cost of national air system is user fee that

These principles, upon which Congress was entitled to rely in passing Section 502, establish that Section 502 likewise is not a "Bill for raising Revenue" within the meaning of the Origination Clause. The purpose of the Foreign Relations Authorization Act as a whole was to authorize appropriations for the Department of State and related agencies for Fiscal Years 1986 and 1987. Title V of the Act (99 Stat. 437), of which Section 502 is a part, addresses several issues bearing on the adjudication of claims of United States nationals against Iran. 131 Cong. Rec. 12515-12516 (1985) (remarks of Sen. Evans). Moreover, Section 502, even if considered alone, does not "levy taxes in the strict sense of the word" (*Twin City Bank* v. *Nebeker*, 167 U.S. at 202), because it assesses a fee for (and thereby defrays the expenses of) particular governmental services, rather than raising revenues to support the operation of the government generally. Compare *id.* at 203; *Millard* v. *Roberts*, 202 U.S. at 435-437; cf. *Head Money Cases*, 112 U.S. at 595-596.[30] In fact, appellees elsewhere insist (Mot. to Dis. or Aff. 14) that "Congress never even purported to exercise its taxing power." Accordingly, Section 502 did not constitute a "Bill for raising Revenue" within the meaning of the Origination Clause, and the Senate's addition of that provision to the pending foreign relations authorization bill did not violate that Clause.

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does not implicate implied constitutional immunity of states from federal taxation); *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261, 265-266 (1935) (flat fee charged each vessel entering port to defray cost of harbor policing not "duty of tonnage" or tax on vessels' privilege of access); *Head Money Cases*, 112 U.S. at 595-596 (50-cent head fee on immigrants brought into country imposed upon ship owners engaging in foreign commerce for government's temporary care and protection of such passengers not a tax within meaning of Constitution, but charge for services rendered); *Morgan's Steamship Co.* v. *Louisiana Board of Health*, 118 U.S. 455, 461-463 (1886) (fixed fee for examination and fumigation of vessels passing a quarantine station is not a tonnage tax within meaning of Constitution, but a fee for services rendered); *Moon* v. *Freeman*, 379 F.2d 382, 391-392 (9th Cir. 1967) (statute requiring purchase of wheat export certificate to defray cost of government wheat purchases to guarantee farmers' annual income not prohibited as levy of tax on exports, but valid regulation of commerce).

[30] The instant case was distinguished on that basis in *United States* v. *Munoz-Flores*, 863 F.2d 654, 657 (9th Cir. 1988), petition for rehearing denied (Mar. 31, 1989). The Ninth Circuit there held that the statutory authorization for a special assessment of $25 against an individual convicted of a misdemeanor (18 U.S.C. 3013(a)(1)(A)(Supp. IV 1986)) is unconstitutional under the Origination Clause.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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REPLY

BRIEF

(9)

No. 88-952

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In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA

v.

SPERRY CORPORATION AND SPERRY WORLD TRADE, INC.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE APPELLANT

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-952

UNITED STATES OF AMERICA, APPELLANT

v.

SPERRY CORPORATION AND SPERRY WORLD TRADE, INC.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE APPELLANT

Appellees realized a substantial benefit from the Iran-United States Claims Tribunal. Prior to the Algiers Accords, appellees had only naked claims against Iran; all Iranian assets in the United States out of which the claims might have been paid had been frozen by the President and could have been released to Iran at any time. But under the Accords, appellees received an award of $2.8 million. Appellees do not and cannot contend that that award was inadequate, since it was based on their settlement with Iran, which they presented to the Tribunal for approval. That approval was necessary for appellees to be paid out of the Security Account, thereby saving them the expense of attempting to satisfy the award by locating and attaching Iranian assets in other countries. Now, appellees seek to avoid the modest 1½% charge that Congress found to be their fair share of the expenses incurred by the United States on behalf of its nationals. There is, however, no merit to appellees' scattershot constitutional assault on Section 502 of the Foreign Relations Authorization Act for Fiscal Years 1986 and 1987 (99 Stat. 438).

I. A. Appellees first broadly question (Br. 27-38) the President's authority to resolve their claims against Iran in a con-

clusive manner, at least if the arbitration process does not perfectly replicate the remedies that might have been available in their suit against Iran in federal district court. This attack on the Algiers Accords has no place here, because appellees do not argue that the Tribunal's $2.8 million award was constitutionally inadequate. But appellees do argue that the Just Compensation Clause absolutely prohibits Congress from charging *any* amount for their use of the Tribunal and Security Account. In their view, the Tribunal's award is "compensation" for an alleged "taking" of the claims on which they had filed suit in federal court, and any deduction from that amount constitutes an impermissible confiscation of their compensation.

1. The first defect in this argument is its premise (Br. 15, 21, 25) that appellees' claims were "taken" by the United States and that the Tribunal award is compensation for that taking. Appellees' claims against Iran were not extinguished by the Algiers Accords (Brownstein, *The Takings Clause and the Iranian Claims Settlement*, 29 U.C.L.A. L. Rev. 984, 1022 (1982)); the Accords merely "suspended" those claims and rendered them of "no legal effect in any action now pending in any court of the United States" (Exec. Order No. 12,294, 3 C.F.R. 104 (1982)), while providing for their resolution in a different forum. *Dames & Moore* v. *Regan*, 453 U.S. 654, 666 (1981). It follows that the Tribunal's award to appellees was not the payment of compensation *by the United States* for a taking of their claims; it was a payment *by Iran* in satisfaction of those claims. For this reason, the deduction of a reasonable charge from the award to reimburse the United States for a portion of its costs in making an alternative forum available is not an invasion of constitutionally mandated compensation.

2. Appellees' absolute taking theory also cannot be squared with the principles underlying the President's claims-settlement authority generally—regardless of the manner of settlement. The Algiers Accords differ from many other claims-settlement agreements, in which the Government formally espouses the claims of its nationals.[1] When a claim is espoused by the Execu-

[1] Under the Accords, claimants such as appellees present their own claims to the Tribunal. Although the United States presents its nationals' claims of less than $250,000 to the Tribunal (J.A. 40), it does not formally espouse those claims either. By contrast, Sections 501 and 503 of the Iran Claims Settlement Act (99 Stat. 437-438) contemplate that the President may espouse and settle remaining claims against Iran at some point in the future.

tive, it becomes the claim of the United States, and the Executive fully controls its presentation and settlement. The private claim is extinguished apart from the espousal process and, upon settlement, the foreign government is relieved of further responsibility.[2] This procedure is typically utilized for lump-sum settlements, which are distributed pro rata to claimants through the Foreign Claims Settlement Commission, based on its valuation of each claim. *Dames & Moore*, 453 U.S. at 680-681; 22 U.S.C. 1621 *et seq.*

Appellees appear to concede (Br. 20) that the President has the authority to settle claims, by arbitration or espousal, and the Court sustained the very agreement at issue here in *Dames & Moore*. See also *United States* v. *Pink*, 315 U.S. 203 (1942). This authority stems from the obvious proposition—based in practical reality and principles of international law—that the actions of a foreign government that injure a United States national also injure the United States in its sovereign capacity. *Frelinghuysen* v. *Key*, 110 U.S. 63, 71-72 (1884).

The President does not act in a fiduciary capacity in this diplomatic process, even when he formally espouses claims. But whatever protection of the claimants' interests the President does afford as the "sole organ" of the Nation in foreign affairs (*United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-320 (1936)) is complete and does not depend on the consent of the claimants. *Dames & Moore*, 453 U.S. at 679-680; compare *Nevada* v. *United States*, 463 U.S. 110, 142 (1983); *Heckman* v. *United States*, 224 U.S. 413, 444-445 (1912). The private claimant is therefore bound by the President's actions, just as a beneficiary is bound by the actions of his trustee. This is so even though the President cannot act in the diplomatic process with exclusive regard for any particular claimant,

[2] *Z. & F. Assets Realization Corp.* v. *Hull*, 311 U.S. 470, 487 (1941); *United States ex rel. Boynton* v. *Blaine*, 139 U.S. 306, 323 (1981); Restatement (Third) of Foreign Relations Law §§ 711, 712, 713 & comment a, 902 & comment i (1986); L. Henkin, *Foreign Affairs and the Constitution* 262 (1975); E. Borchard, *The Diplomatic Protection of Citizens Abroad* 296, 299 (1915).

because he also must protect the interests of the Nation as a whole. *Dames & Moore*, 453 U.S. at 680; *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 109-110 (1948); compare *Nevada* v. *United States*, 463 U.S. at 127-128, 142-143, 144 n.16; *Vaca* v. *Sipes*, 386 U.S. 171, 190-193 (1967). The President's authority would be seriously eroded if a disgruntled claimant could collaterally attack the President's judgment by bringing an action in United States courts to recover compensation for whatever additional amount he believes the President should have insisted upon. The result would be judicial second-guessing of the President's performance in diplomatic negotiations, without the benefit of confidential information about the bargaining process, the position of the foreign government, and the myriad other considerations that might have informed the President's judgment. *Waterman Steamship*, 333 U.S. at 111-112; *Belk* v. *United States*, 858 F.2d 706, 710 (Fed. Cir. 1988); *Shanghai Power Co.* v. *United States*, 4 Cl. Ct. 237, 247-249 (1983), aff'd mem., 765 F.2d 159 (Fed. Cir.) (Table), cert. denied, 474 U.S. 909 (1985).[3]

The established nature of the President's settlement power undermines the force of any taking argument from the perspective of the private claimant as well. Commercial and other dealings with a foreign sovereign, and claims arising out of those dealings, entail greater uncertainty than do their domestic counterparts, and United States nationals assume both the risks and the benefits associated with the President's ability to resolve disputes by diplomatic means. *Pink*, 315 U.S. at 228-230; *Belk*, 858 F.2d at 709-710; *Shanghai Power*, 4 Cl. Ct. at 244-247; compare *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005-1010 (1984). The compromise that infuses diplomatic

[3] If the claimant is dissatisfied with the amount received in settlement of his claim, any possible cause of action against the United States would sound in tort, not in taking, because it would be based on allegations that the President failed to advance his interests adequately in the bargaining process with another government, not that his claim was appropriated by the United States. Cf. *DelCostello* v. *Teamsters*, 462 U.S. 151, 167 (1983). By virtue of the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), Congress has not waived the immunity of the United States to such a suit.

undertakings may result in a smaller recovery from the foreign sovereign than the private claimant might have obtained in a conventional lawsuit. But that foreseeable and unremarkable consequence does not create a right to sue the United States for the difference.

The nature of the interests appellees assert and related problems of valuation also counsel against an inflexible invocation of taking principles developed in other settings. If we assume that appellees' unliquidated claims against Iran were "property" interests protected by the Fifth Amendment—even as against the President's settlement power—their value was, at most, "the sum that would in all probability [have] result[ed] from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy." *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106, 123-124 (1924); accord *United States* v. *50 Acres of Land*, 469 U.S. 24, 29 (1984). If appellees had tried to assign their claims during the hostage crisis, they almost certainly would have realized far less than they would have received for a wholly domestic chose in action. At that time, the President's blocking order made it clear that resolution of their claims against Iran would likely depend on diplomatic measures and that their attachments were revocable at any time. Many claimants also faced legal obstacles in United States courts, including jurisdictional limitations on expropriation claims (28 U.S.C. 1605(a)(3)), insufficient contacts with the United States for commercial claims (28 U.S.C. 1605(a)(2)), the Act of State doctrine, forum-selection and arbitration clauses, and the arguably separate juridical status of Iranian entities (*First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983)). *Dames & Moore*, 453 U.S. at 687. Although appellees insist (Br. 34-35) that there were no such obstacles in some cases, the intricacies of suits against foreign governments render any such prediction precarious; and the President must act with the generality of cases in mind, typically without the opportunity to ascertain the viability and value of individual claims. Cf. *Langley* v. *FDIC*, 108 S. Ct. 396, 401 (1987).

In any event, appellees concede that "it would be difficult to compare directly the likelihood of recoveries in U.S. courts versus the Tribunal" (Br. 35-36). In the face of such uncertainty,

the courts should not second-guess the considered judgment of the President that the claims of United States nationals would best be resolved through arbitration. Congress ratified that judgment by enacting the Iran Claims Settlement Act in 1985, after three years' experience under the Algiers Accords.[4] Appellees' forum preferences and speculation fall far short of the showing necessary for a court to perform " 'the gravest and most delicate duty' " of holding that Act of Congress unconstitutional. *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981).

3. As precedential support for their broad taking argument, appellees primarily rely (Br. 20) on *Gray* v. *United States*, 21 Ct. Ct. 340 (1886). *Gray* involved unique circumstances: the Court of Claims, under a special Act of Congress requesting an advisory opinion, considered claims against the United States for the extinguishment of private claims against France by an 1800 treaty; the court believed that a taking had occurred because the American claims were valid and would have been honored by France, but were nevertheless released in full by the United States. See *Aris Gloves, Inc.* v. *United States*, 420 F.2d 1386, 1396-1397 (Ct. Cl. 1970) (Nichols, J., concurring). Here, by contrast, there was no indication that American claims would have been honored by Iran, and private claims were protected, not renounced, by the United States. Moreover, *Gray* was "strictly an advisory opinion which was not binding upon either of the parties and cannot be binding upon subsequent courts" (*Aris Gloves*, 420 F.2d at 1393). And the payments made by Congress in response to *Gray* "were purposely brought within the category of payments by way of gratuity, payment as of grace and not of right." *Blagge* v. *Balch*, 162 U.S. 439, 457 (1896). See also *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) ("it is not for the court, but for the

[4] Amicus Chevron's recitation (Br. 15-16) of one incident involving Tribunal members six years ago cannot obscure the notable success of the Tribunal, which has awarded more than $1 billion to United States claimants and has generally proceeded in a judicious manner despite the difficult relations between the United States and Iran. See Blum, *Behind the Hostilities, They Talked in Court*, 8 Nat'l L.J. 8 (June 19, 1989).

government, to consider whether it be a case proper for compensation").[5]

Appellees also contend (Br. 19) that it was "implicit" in *Dames & Moore* that there must be a remedy in the Claims Court for any claim that the suspension of ligitation in United States courts or the non-payment or reduction of Tribunal awards is an unconstitutional taking. But the Court held only that the Court of Claims would have *jurisdiction* to entertain a suit alleging a taking as a result of the suspension of claims; the Court expressly did not decide the merits of the taking argument. 453 U.S. at 688 & n.14.[6] Moreover, appellees largely base their taking argument on the attachments they obtained in federal court (Br. 17, 32). But *Dames & Moore* held that because such attachments were obtained only pursuant to a revocable Treasury license and were "in every sense subordinate to the President's power under the IEEPA," claimants did not acquire a property interest in them that would support a taking claim. 453 U.S. at 674 n.6.

Nor are appellees correct in contending (Br. 21) that they at least had a "constitutionally protected right of access to the courts" to litigate their commercial claims against Iran. A foreign sovereign was absolutely immune from suit throughout most of the Nation's history (*Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812)) and was not subject to suit on commercial claims until the "restrictive theory" of sovereign im-

[5] In *Meade* v. *United States*, 2 Ct. Cl. 224 (1866), aff'd, 76 U.S. (9 Wall.) 691 (1870), also cited by appellees (Br. 20), this Court did not concur in the Court of Claims' finding that the United States was liable for a taking; it instead concluded that the claim was barred because it had been dismissed by the treaty commissioner. See 76 U.S. (9 Wall.) at 700-701, 725.

[6] As appellees point out (Br. 19, 25), Justice Powell's separate opinion, which was not joined by any other Member of the Court, did suggest that a party could recover against the United States if his claim against Iran was "not fully paid" (453 U.S. at 691). It is not clear what the quoted phrase meant—*e.g.*, whether it referred to situations where the Tribunal's award was less than the judgment that would have been entered by a United States court, or where an award was not paid because there were insufficient funds in the Security Account. In any event, Justice Powell did not suggest that the Fifth Amendment would bar Congress from charging a modest fee for use of the Tribunal.

munity was adopted by the Executive Branch in 1952 and then codified in the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1605(a)(2). *Dames & Moore*, 453 U.S. at 683-686. Just as Congress may decline to waive the sovereign immunity of the United States or repeal an existing waiver of immunity even in pending suits,[7] Congress also may deprive federal (and state) courts of jurisdiction over a foreign sovereign. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 109 S. Ct. 683, 688-690 (1989). Although the Algiers Accords did not deprive United States courts of jurisdiction over suits against Iran (*Dames & Moore*, 453 U.S. at 684-685), Congress's power to do so establishes that the President's lesser action of suspending claims in United States courts did not violate appellees' constitutional rights. See Gov't Br. 36-37.

Appellees argue (Br. 22-25) that enactment of the FSIA in 1976 effectively announced that the President would not invoke his constitutionally based settlement authority with respect to private commercial claims that were the subject of litigation in United States courts. This argument is refuted by *Dames & Moore*, which held that the FSIA "cannot be fairly read as *prohibiting* the President from settling claims of United States nationals against foreign governments" (453 U.S. at 685 (emphasis in original)), especially given the President's continued settlement of claims after the restrictive theory of sovereign immunity was adopted in 1952. Thus, both before and after enactment of the FSIA, United States nationals who engage in commerce with foreign sovereigns have been on notice that the President may be required to settle any ensuing disputes. Brownstein, *supra*, 29 U.C.L.A. L. Rev. at 1062-1069, 1074.

B. In addition to challenging the President's authority to settle their underlying claims, appellees also make several narrower objections under the Just Compensation Clause.

1. Appellees concede (Br. 32) that they utilized and benefited from the Tribunal and Security Account, which afforded them a neutral forum for resolution of their claims. Appellees also do not quarrel with our submission (Gov't Br. 25) that the government may allocate the costs of its activities to those who specially benefit from them. And appellees cannot dispute that the charge imposed by Section 502 bears a direct relationship to the extent of the financial benefit they ultimately realized, since it is assessed as a percentage of the Tribunal's award. But appellees argue that "the extent to which a claimant is a beneficiary of governmental action is only relevant if the claimant was the particular *intended* beneficiary of the action" (Br. 32 (emphasis in original)); here, appellees insist that the intended beneficiary of the claims-settlement provisions of the Algiers Accords was the Nation as a whole, not any individual claimant. This is but a variant of appellees' assertion that their claims against Iran were sacrificed as "bargaining chips" to secure the release of the hostages. In fact, the President consistently sought to protect the interests of claimants. President Carter blocked Iranian property at the outset of the hostage crisis "to ensure that claims on Iran by the United States and its citizens are provided for in an orderly manner" (15 Weekly Comp. Pres. Doc. 2117 (Nov. 14, 1979)). Similarly, the Algiers Accords state that the Tribunal was "established for the purpose of deciding claims of nationals of the United States against Iran" and that the Security Account is "to be used for the sole purpose of securing the payment of, and paying, claims against Iran" (J.A. 38, 33). See Gov't Br. 39-40; compare *YMCA* v. *United States*, 395 U.S. 85, 92 (1969); *Belk*, 858 F.2d at 709.

2. Appellees' complaint (Br. 33-34) that they did not "voluntarily" submit their claims to the Tribunal fails for two reasons. First, the government is not required to allocate costs only to persons who choose to benefit from its services. For example, courts commonly assess costs against losing defendants. Moreover, the Secretary of the Interior is authorized to collect reasonable fees for managing property held in trust for Indians, even where the Indians did not request that the property be held in trust. See Gov't Br. 32-33 n.22. Although the President is not a trustee for persons having claims against a foreign government, the Constitution affords him analogous authority to act

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[7] *Lynch* v. *United States*, 292 U.S. 571, 579-582 (1934); *People of Enewetak* v. *United States*, 864 F.2d 134 (Fed. Cir. 1988), cert. denied, No. 88-1466 (June 19, 1989); *Hammond* v. *United States*, 786 F.2d 8, 11-12 (1st Cir. 1986).

without their specific consent. The trust analogy therefore supports the right of the government to recover the costs of doing so.

Second, appellees *did* voluntarily invoke the jurisdiction of the Tribunal and submit their settlement to the Tribunal for approval. Because appellees do not argue that they were required by law to file with the Tribunal, their argument reduces to the proposition that they had no better alternative as a practical matter. But that motivation did not render appellees' resort to the Tribunal legally "involuntary." Cf. *Brady* v. *United States*, 397 U.S. 742, 749-752 (1970). On that theory, their filing of suit in federal district court was "involuntary" as well, since it may have been the only way they could have recovered from Iran. There are many governmental services that people have little choice but to utilize—*e.g.*, drivers' licenses and public transportation—yet it has never been suggested that the government is barred from charging a fee for those services.

3. Appellees next contend (Br. 36, 40) that Section 502 effects an unconstitutional taking because it departs from prior policy. They rely in part on the statement in the Algiers Accords that "[t]he expenses of the Tribunal shall be borne equally by the two governments" (J.A. 41). That provision, however, recites the reciprocal undertakings of the two governments; it does not bar them from assessing fees against their own nationals. Appellees also note that the Accords require the Tribunal to follow the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) (J.A. 39), which, they assert (Br. 40), require the losing party to pay costs unless the parties agree otherwise. In fact, although UNCITRAL Rule 40 provides that "in principle" the costs of arbitration (other than legal representation) shall be borne by the unsuccessful party, it further provides that the arbitral tribunal "may apportion such costs between the parties if it determines that apportionment is reasonable," "taking into account the circumstances of the case."[8] Moreover, the UNCITRAL Rules do not cover the costs of enforcing an arbitral award. In this case, the Security Account saved appellees the expense of attempting to enforce the

[8] Similarly, a number of appellees' contracts with Iran provided for arbitration of disputes under the rules of the International Chamber of Commerce, which also permit the allocation of costs between the parties. Gov't Br. 35-37.

Tribunal's award by attaching Iranian assets elsewhere. It therefore is both fair and consistent with the UNCITRAL Rules to assess a fee against appellees for their proportional share of the costs of maintaining that Account, as well as those of the Tribunal.

4. Appellees erroneously assert (Br. 36, 40) that when they filed their claim with the Tribunal on January 12, 1982, they had no reason to expect that the uniform practice of deducting a fee would be continued under the Iranian settlement. Two leading commentators on the settlement stated immediately after *Dames & Moore* that "[t]he United States may seek partial reimbursement for its share from claimants, perhaps in the form of a filing fee" (M. Ball & L. Harris, *Iranian Claims Settlement: A Guide for Commercial Claimants*, Corp. Prac. Series (BNA), at 12 (Supp. July 14, 1981)).[9] Similarly, a specialized reporting service advised claimants in December 1981 that the government was weighing plans to deduct a percentage of awards "to offset paying its share of the Tribunal's operating costs," and that it believed such a deduction was "not ruled out by the Algerian accords or the Uncitral Rules that govern the Tribunal's operation" (Iranian Assets Litigation Rep. (Andrews), at 3923 (Dec. 4, 1981)). In any event, the fee was not triggered by appellees' filing of a claim with the Tribunal. Under both the Directive License and Section 502, the charge was not assessed until they received payment of the award. The Directive License was issued on June 7, 1982, one month before appellees and Iran submitted their settlement to the Tribunal for approval. Appellees therefore were on notice of the charge when they took the action that triggered the assessment.[10]

[9] See also *Iran Claims Legislation: Hearing on S. 771 and S. 1166 Before the Senate Comm. on Foreign Relations*, 99th Cong., 1st Sess. 120 (1985) (State Department submission) ("the Administration's intention to seek reimbursement for Tribunal-related expenses from awards has been publicly known since at least August 1981, some 5 months *before* the filing date for private claims") [hereinafter *Hearing*].

[10] Amicus Chevron likewise complains (Br. 16-19) that it had no reason to believe that a fee would be assessed. But Chevron concedes (Br. 3 & n.8) that it did not receive its $115 million award until January 13, 1986, more than six months after Section 502 was enacted, and its $1.5 million award until June 1, 1983, almost one year after the Directive License was issued. Furthermore, the parties were free to agree to offset the $116.5 million Iran owed Chevron

5. Finally, appellees attempt to base their Fifth Amendment challenge on the manner in which the charge is calculated. Section 502 reimburses the United States for furnishing its nationals with a neutral forum for the resolution and payment of their claims; the charge is measured by the financial benefit they realize; and it is assessed at a rate that could not remotely be characterized as confiscatory. Section 502 therefore is fully consistent with the principles of "fairness and justice" embodied in the Just Compensation Clause. *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

Nevertheless, relying on decisions construing statutes that authorize agencies to assess "user fees," appellees contend (Br. 29-31) that the 1½% charge is invalid under the Fifth Amendment because it is not closely calibrated to the costs that were actually incurred in resolving their particular claims.[11] Contrary to appellees' contention, it is by no means clear that Section 502's fee structure differs from those permitted by statutes that authorize federal agencies to assess fees. See, *e.g.*, *Florida Power & Light Co.* v. *United States*, 846 F.2d 765, 770-771

against the $175 million Chevron owed Iran. See Chevron Br. 3-4. If they had done so, Chevron would not have received any payment out of the Security Account and therefore would not have been assessed a fee under Section 502.

[11] Significantly, appellees do not contend, and have no basis for contending, that the total amount of the charges collected exceeds the total amount of the United States' expenses. Congress found in 1985 that the United States' annual expenditures for the Tribunal and Security Account were approximately $2 million and $1 million, respectively, and that additional expenditures (estimated by the State Department to be $1 million annually (*Hearing* 14-15, 26)) were incurred in advising claimants, arguing legal issues common to all claimants, and presenting small claims. S. Rep. No. 78, 99th Cong., 1st Sess. 2-3 (1985) (report on S. 1166, 99th Cong., 1st Sess. (1985), which was added as a floor amendment to the foreign relations bill, see 131 Cong. Rec. 14,913-14,916, 15,112-15,113 (1985)). By 1985, the 2% charge imposed by the Directive License had generated $6.8 million in fees, which covered only a little more than one-half of the United States' share of the expenses for the Tribunal and the Security Account. *Hearing* 112.

The United States' contributions to the Tribunal have increased to $2.886 million annually (Gov't Br. 10 n.12), although we have been informed by the Department of the Treasury that the United States' liability for the Security Account has declined to $450,000 annually as of March 1, 1989. We also have been informed by the Departments of State and the Treasury that a total of $12.7 million had been collected under Section 502 as of June 1, 1989, and that the expenses incurred by the United States for the Tribunal and Security Account alone had totaled more than $25 million.

(D.C. Cir. 1988), cert. denied, 109 S. Ct. 1952 (1989); *Skinner* v. *Mid-America Pipeline Co.*, 109 S. Ct. 1726, 1731 (1989) (discussing a fee based on a company's "revenues").[12] The Court need not address that question, however, because, as the Claims Court recognized when it invalidated the Directive License under the Independent Offices Appropriations Act, 31 U.S.C. 9701 (J.S. App. 40a-41a), the Constitution does not impose comparable restrictions on Congress.

There are various ways in which a legislature may structure a fee schedule. Aside from the average or marginal costs incurred on behalf of particular individuals, which appellees stress, the legislature might take into account the nature and value of the benefits to the recipient, similar public and private fee arrangements, public policies that encourage or discourage certain conduct, ability to pay, other special attributes of persons who utilize the goods or services, the administrative costs of calculating a fee on an individualized basis, market factors, and fundamental fairness. Drawing on these considerations, Congress reasonably could determine that the fee structure under Section 502 should not be based solely on the costs incurred on behalf of each individual claimant, but should also take into account the financial benefit realized by successful claimants, the past practice of deducting 5% from awards by the Foreign Claims Settlement Commission, analogous contingent-fee arrangements of private attorneys, the policy of not discouraging claimants from filing with the Tribunal, the benefit that all claimants realize from the sound operation of the Tribunal, and the difficulties of allocating costs to discrete adjudications under an ongoing program. The Court recently declined to construe the

[12] In contrast to the fee schedules invalidated in *National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 340-341, 343-344 (1974), and *FPC* v. *New England Power Co.*, 415 U.S. 345, 349-351 (1974), Section 502 assesses a charge only on the basis of the value to the recipient (measured by the amount of the Tribunal award), only on the basis of a filing by and award to the claimant, and only to reimburse a portion of the aggregate expenditures incurred by the United States on behalf of claimants. Compare *Central & Southern Motor Freight Tariff Ass'n* v. *United States*, 777 F.2d 722, 729-731 (D.C. Cir. 1985); *City of Vanceburg* v. *FERC*, 571 F.2d 630, 643, 646-647 (D.C. Cir. 1977), cert. denied, 439 U.S. 818 (1978). But cf. *Raton Gas Transmission Co.* v. *FERC*, 852 F.2d 612, 617-618 (D.C. Cir. 1988); *National Cable Television Ass'n* v. *FCC*, 554 F.2d 1094, 1104-1108 & n.40 (D.C. Cir. 1976); *Capital Cities Communications, Inc.* v. *FCC*, 554 F.2d 1135, 1138 (D.C. Cir. 1976).

Fifth Amendment to require a particular methodology of rate regulation for public utilities, holding that as long as the impact is not "unjust" or "unreasonable," the Constitution "leaves the States free to decide what rate-setting methodology best meets their needs in balancing the interests of the utility and the public" (*Duquesne Light Co.* v. *Barasch*, 109 S. Ct. 609, 617, 620 (1989)). *A fortiori*, the Constitution leaves Congress free to decide what methodology is appropriate in setting rates for services furnished by the government itself.

Moreover, appellees ignore the fact that Congress *did* tailor the fee schedule to take account of the considerations they raise. The Senate Committee stated that the assessment of a fee of 1½% of awards up to $5 million and 1% in excess of that amount was a middle ground between the Administration's proposal for a flat 2% fee and the suggestion by "[s]ome claimants" that no fee be charged. S. Rep. No. 78, *supra*, at 5. The Committee explained that "at some point the relationship between the size of the claim and the benefit received [from the existence of the Tribunal and the services provided by the State Department] declines," and that "[b]ased on the recommendations of the American Bar Association and others, the Committee determined that $5,000,000 was the appropriate dividing line" (*ibid.*).[13] See also 131 Cong. Rec. 12,516 (1985) (remarks of Sen. Evans). Nothing in the Just Compensation Clause required Congress to draw a different line or more finely calibrate the fee schedule.

II. A. Appellees contend (Br. 37-41) that Section 502 violates the Due Process Clause because Congress made it effective as of June 7, 1982. As appellees concede (Br. 38), that claim fails if "retroactive application of the legislation is itself justified by a rational legislative purpose" (*Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); see also *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976)). The June 7, 1982, date serves a "rational legislative purpose," because it rendered Section 502 effective upon the first payment

[13] See *Hearing* 99 (testimony of representative of Committee on Foreign Claims of ABA Section of International Law and Practice) ("We are satisfied that the fee schedule set out in the proposed act is reasonable under these circumstances and our committee of the American Bar Association recommends approval of the bill."); *id.* at 103-104 (same).

of a Tribunal award and thus "provide[ed] uniform treatment" for all successful claimants. Otherwise, claimants who experienced delays in arbitration, many of whom have small claims, would have shouldered the burden. *Hearing* 111-112; see *Turner Elkhorn*, 428 U.S. at 16-19.

In addition, June 7, 1982, was the effective date of the Directive License that assessed a 2% fee. In enacting Section 502, Congress ratified the Treasury Department's judgment that a fee should be assessed and cured the technical defects that the non-final Claims Court decision in this case had identified in the Directive License under the IOAA (J.S. App. 26a-51a). Appellees concede (Br. 38-39) that Congress may enact curative legislation, but they deny that Section 502 falls within that category. However, one of the cases they cite, *United States* v. *Heinszen & Co.*, 206 U.S. 370 (1907), illustrates the latitude Congress has in this respect. In *Heinszen*, the Court sustained an Act of Congress that ratified the collection of tariffs during a period for which this Court previously had held them to be unauthorized. Drawing on the rule of agency law that allows a principal to ratify the unauthorized acts of his agent (*id.* at 382-383), the Court reasoned that Congress "may * * * cure irregularities, and confirm proceedings which without the confirmation would be void, because unauthorized, provided such confirmation does not interfere with intervening rights" (*id.* at 384). It did not matter that the plaintiff had already sued to recover the duties, because " '[t]he bringing of suits vests in a party no right to a particular decision, and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered' " (*id.* at 387 (citations omitted)).

Appellees rely (Br. 38) on *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338 (1922). There, however, the legislature authorized the retroactive collection of a toll on the same day that the state supreme court held the agency was not authorized to collect the toll from the plaintiff (*id.* at 338-339). The statute thus deprived the plaintiff of the benefit of its judgment (*id.* at 340). The Court has since declined to extend *Forbes* "beyond its facts" (*Charlotte Harbor & N. Ry.* v. *Welles*, 260 U.S. 8, 12 (1922)), distinguishing it as a "bare attempt of the

legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention"; by contrast, the Court has approved *Heinszen* and similar cases that involved "a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice" and where the "asserted vested right" to be free of the assessment was not "linked to any substantial equity." *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 429 (1931); *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 302 (1937). Section 502 is consistent with these principles, because it cures the technical defects in the administrative assessment of a fee and because appellees' interest in being exempted from the 1½% fee is not "linked to any substantial equity."[14]

B. Appellees contend (Br. 41-44) that Section 502 violates the equal protection component of the Due Process Clause because it assesses a charge only against successful claimants. Appellees fail to acknowledge the applicable standard of review: " '[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' " *Bowen* v. *Gilliard*, 483 U.S. 587, 601 (1987), quoting *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970). Congress reasonably could determine that only claimants who prevail before the Tribunal and receive a payment from the Security Account realize a sufficient benefit to warrant assessment of a charge. Moreover, as Senator Evans, the principal sponsor, pointed out, Section 502 is similar to contingent-fee arrangements for lawyers. *Hearing*

[14] As appellees concede (Br. 39-40), a related factor—illustrated by the contrast between *Heinszen* and *Forbes*—is whether the challenged statute is a marked departure from the substantive law that reasonably could have been expected to govern. See *State ex rel. Van Emmerik* v. *Janklow*, 304 N.W.2d 700, 704-705 (S.D. 1981), appeal dismissed, 454 U.S. 1131 (1982). Contrary to appellees' contention (Br. 40), Section 502 does not depart from prior statutory policy; it is consistent with the explicit policy of the IOAA that "each service * * * provided by an agency * * * to a person * * * is to be self-sustaining to the extent possible" (31 U.S.C. 9701(a)) and with the uniform practice of deducting a (much larger) fee from payments of awards by the Foreign Claims Settlement Commission. See Gov't Br. 44.

109. Finally, the State Department informed Congress in 1985 that if a flat fee were assessed against everyone who filed a claim with the Tribunal, many persons might be deterred from pursuing their claims (*Hearing* 113).[15]

Appellees also allege (Br. 41, 44) an equal protection violation because no fee is assessed against banks that do not receive Tribunal awards and whose claims are instead paid out of a special account in the Bank of England (see J.A. 44). As the State Department explained to Congress in 1985, however, resolution of bank claims has resulted in little expense to the United States Government. The United States is not charged a fee to maintain the account in the Bank of England, as it is to maintain the Security Account; and because banking claims usually raise no difficult questions of liability, valuation, or proof, banks have had little reason to use the Tribunal or request assistance from the United States. *Hearing* 121. These factors amply justified Congress's decision not to assess a fee against banks (and other claimants) that did not utilize the Tribunal and Security Account. Compare *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines*, 405 U.S. 707, 717-718, 719 n.13 (1972).

III. Appellees' final contention (see Br. 45-48) is that Section 502 violates the Origination Clause of the Constitution (Art. I, § 7) because it was added by the Senate to the House-passed foreign relations authorization bill. This argument is without merit. Under *United States* v. *Norton*, 91 U.S. 566 (1876); *Twin City Bank* v. *Nebeker*, 167 U.S. 196 (1897), and *Millard* v. *Roberts*, 202 U.S. 429, 436-437 (1906), which appellees concede (Br. 45-47) are the controlling precedents, the provision enacted as Section 502 was not a "Bill[ ] for raising Revenue" within the meaning of the Origination Clause.[16]

[15] Appellees' reliance (Br. 42-43 & n.46) on *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966), is misplaced. The Court held that the state statute invidiously discriminated against incarcerated defendants (*id.* at 309), but it did not question the statutory distinction between successful and unsuccessful litigants.

[16] Section 502 was not the first such measure passed by Congress on the apparent assumption that it was not a "Bill[ ] for raising Revenue" within the meaning of the Clause. Two other claims-settlement programs originated in Senate bills that provided for the deduction of a 5% charge from awards made

In *Norton*, the Court held that the law establishing a postal money-order system was not a "revenue law." Although the case involved a question of statutory interpretation, the Court drew on the "well settled" construction by Congress of the Origination Clause. 91 U.S. at 568-569. Quoting Justice Story, the Court noted that the Clause " 'has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes which incidentally create revenue' "; and it concluded that "revenue laws" are those " 'made for the direct and avowed purpose of creating revenue or public funds for the service of the government' " (*id.* at 569).[17] Excluded from this category were "the proceeds of the public lands, those arising from the sale of public securities, the receipts of the Patent Office in excess of its expenditures, and those of the Post-office Department, when there should be such excess" (*id.* at 568). *Norton* thus supports our submission that Section 502, which generates receipts only for services rendered, is not a "Bill[] for raising Revenue" within the meaning of the Origination Clause. In fact, appellees effectively concede that Section 502 does not "levy taxes in the strict sense of the words" (91 U.S. at 569), because they insist (Br. 27 n.30) that "Congress never claimed the taxing power."

In *Nebeker*, the Court rejected an Origination Clause challenge to a statute that imposed a "tax" on bank notes in circulation, to defray the cost of a national currency system. The Court found the Clause inapplicable because the assessment was only the "means for effectually accomplishing" the object of establishing a national currency and "[t]here was no purpose

by the Foreign Claims Settlement Commission. 22 U.S.C. 1644g (German Democratic Republic) (see S. Rep. No. 1188, 94th Cong., 2d Sess. 3 (1976); 122 Cong. Rec. 30,978 (1976)); 72 Stat. 527 (Czechoslovakia) (see S. Rep. No. 1794, 85th Cong., 2d Sess. 8 (1958); H.R. Rep. No. 2227, 85th Cong., 2d Sess. 10 (1958); 104 Cong. Rec. 13,245, 15,473-15,476 (1958)).

[17] A similar construction of the constitutional provision is supported by its language, which does not encompass all bills having the effect of generating revenue, but instead is limited to bills "for" (*i.e.*, for the purpose of) raising revenue. This construction of the Clause is also supported by the debates at the Constitutional Convention. See 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 263 (Randolph); *id.* at 273 (Mason); *id.* at 276 (Madison) (1966).

• • • to raise revenue to be applied in meeting the expenses or obligations of the Government" (167 U.S. at 203). So here, Section 502 was enacted for the specific purpose of defraying expenses incurred on behalf of claimants before the Tribunal, not to raise revenue to support the government generally. Similarly, the Court held in *Millard* that the Clause did not apply to bills providing for railroad construction costs in the District of Columbia to be paid out of property taxes. Following *Nebeker*, the Court reasoned that "[w]hatever taxes are imposed are but means to the purpose provided by the act" (202 U.S. at 436-437).[18]

Appellees attempt (Br. 45, 47-48) to distinguish *Norton*, *Nebeker* and *Millard* on the ground that the Iran Claims Settlement Act did not itself establish the Tribunal or regulate the adjudication and payment of claims, but only provided for a monetary assessment. Appellees' effort to uncouple Section 502 from the Algiers Accords is unavailing. There was no occasion for Congress to enact separate statutory provisions governing the adjudication and payment of claims, because the Tribunal and Security Account had already been established pursuant to the independent constitutional authority of the President. The fact that the regulatory regime was already in existence did not transform a bill that was specifically designed to defray the ex-

[18] Amicus Chevron argues (Br. 24-25) that the measures excluded from the Origination Clause in *Norton* and *Nebeker* illustrate the importance of both voluntariness in the underlying transaction and the relationship of fees to costs. In fact, neither factor was mentioned in those opinions. Although Chevron asserts that the money-order system in *Norton* "[was] not designed to make a profit" and that the assessments in *Nebeker* "were apparently limited to covering 'the expenses necessarily incurred' in managing the bank note system" (Br. 24-25), Section 502 shares those features. Congress reasonably determined that the 1½% rate would cover a portion of the United States' expenses on behalf of claimants, and it expressed no purpose to "make a profit" on the claims-settlement program. Moreover, the fee in *Nebeker* was a fixed percentage of each bank's notes in circulation, without regard to the costs incurred on behalf of the bank concerned, and the property tax in *Millard* presumably was also assessed on the basis of the property's value, not the benefits conferred on its owner. Finally, there is no suggestion that the property tax assessments in *Millard* were voluntary in any sense, and the banks subject to the "tax" in *Nebeker* may have had little opportunity as a practical matter to avoid the assessment.

penses of that regime into a "Bill[ ] for raising Revenue." The result in *Nebeker*, for example, did not turn on whether the national currency system was already in place when Congress enacted the "tax" to support it. The test under this Court's cases looks to the purpose, not the timing, of the enactment—*e.g.*, to whether funds are to be received for services rendered or to defray particular expenditures, rather than as general taxes.[19]

Appellees (Br. 47) and amicus Chevron (Br. 25-26) argue that a general revenue-raising purpose is revealed in Senator Evans' passing observation that the funds "would go into the Treasury to offset the deficit" (131 Cong. Rec. 12,516 (1985)). Senator Evans was explaining an incidental consequence of the bill. The true purpose of Section 502 is clear from its text, which states that the deduction is made "as reimbursement to the United States Government for expenses incurred in connection with the arbitration of claims of United States claimants against Iran • • • and the maintenance of the Security Account" (99 Stat. 438)).

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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JUNE 1989

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[19] Appellees argue (Br. 47 n.51) that if Section 502 were meant to fund the Tribunal, Congress would have directed that proceeds be deposited in a special account in the Treasury for that purpose. The absence of a special account in the Treasury in no way impeaches Congress's statement in the text of Section 502 that the deduction is intended to defray the United States' expenses for the Tribunal and Security Account. The user fees deducted under the IOAA and the International Claims Settlement Act likewise are covered into the Treasury as miscellaneous receipts. 22 U.S.C. 1626(b); 31 U.S.C. 3302, 9701.

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APPELLEE'S

BRIEF

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QUESTIONS PRESENTED

In August 1985, Congress enacted the Iran Claims Settlement Act to retroactively authorize deductions from every award of the Iran-United States Claims Tribunal rendered in favor of a U.S. claimant. This legislation was designed to prevent a refund of the amounts deducted from those arbitral awards under an earlier administrative scheme that was declared void by the United States Claims Court. Although this retroactive legislation was upheld by the Claims Court, the court of appeals found the Act inconsistent with the Takings Clause of the Fifth Amendment. The question presented on reviewing that decision here is:

1. Whether the court of appeals correctly found that legislative authorization of deductions from awards of the Tribunal imposes the costs of implementing foreign policy objectives upon a discrete few and thus is a taking of property for public use without compensation, in violation of the Fifth Amendment to the United States Constitution.

Appellees also challenged the legislation on separate constitutional grounds below, which are reasserted here. The questions presented on those issues are:

2. Whether the three-year retroactive application of the legislation authorizing deductions from Tribunal awards is unconstitutional as an abrupt change in policy and encouragement of official misconduct because there was a previous judicial determination that the United States Department of Treasury illegally made those same deductions;

3. Whether deducting from Tribunal awards the costs of establishing and operating the Tribunal is a denial of equal protection of the law by allocating all the costs of the Tribunal to only certain claimants who proceeded there, and thus creating an impermissible classification for purposes of assessing such costs; and

4. Whether the legislation authorizing deductions from Tribunal awards is unconstitutional under the Origination Clause of the Constitution because it raises revenue but improperly originated in the Senate.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-952

THE UNITED STATES OF AMERICA,

Appellant,

v.

SPERRY CORPORATION AND
SPERRY WORLD TRADE, INC.,

Appellees.

On Appeal From The United States Court Of Appeals For The Federal Circuit

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BRIEF FOR APPELLEES

Appellees Sperry Corporation and Sperry World Trade, Inc. respectfully pray this Court affirm the judgment below, find unconstitutional the Iran Claims Settlement Act and void the assessment of deductions from awards of the Iran-U.S. Claims Tribunal.[1]

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[1] As set forth in Appellees' Motion to Dismiss or Affirm ("Mot. Dis. or Aff."), the real party in interest is UNISYS Corporation, the successor to Appellees Sperry Corporation and Sperry World Trade, Inc. following the merger of Sperry Corporation and Burroughs Corporation, and renamed as of November 16, 1987. UNISYS affiliates and subsidiaries are Nippon Unisys Kaisha, Ltd., Oki Unisys Kaisha, Ltd., Sperry Arabia Ltd., Tecnologia S.p.A., UNISOFT - Sistemas Informaticos S.A., Tata Unisys Ltd., Compubur, S.A. de C.V., Synapsis S.A., IDAT, Industria de Alta Tecnologica, S.A., Unisys-Cyberware Inc., Sperry Dalmo Victor, Inc., and SDC (1981) Ltd.

STATEMENT OF THE CASE

1. Background And Litigation. On December 17, 1982, Appellees Sperry Corporation and Sperry World Trade, Inc. (collectively "Sperry") commenced an action in the United States Claims Court on behalf of themselves and a class of persons and other entities similarly situated who had claims pending before the Iran-United States Claims Tribunal ("Tribunal") and whose awards or payments from the Tribunal were uniformly reduced by a two percent fee paid to the United States Department of Treasury ("Treasury") under authority of a Directive License issued by Treasury.

Sperry, as well as other American nationals and corporations, previously had litigation pending in the courts of the United States against Iran and various Iranian instrumentalities. That litigation was suspended involuntarily by the agreement between Iran and the United States on January 19, 1981, in return for the release of fifty-two American diplomats and citizens held hostage since November 4, 1979. As part of these agreements, more popularly known as the Algiers Accords, the United States and Iran further agreed to establish an arbitral tribunal to decide some of the suspended claims.

After the deadline for filing claims at the Tribunal, and immediately before the payment of the first Tribunal award, Treasury issued a Directive License assessing percentage deductions against awards of the Tribunal as they were received by the Federal Reserve Bank of New York before forwarding the payments on to U.S. claimants. Sperry asserted in the Claims Court that Treasury did not have the authority to issue the Directive License and that Treasury also failed to follow applicable statutory requirements in promulgating the Directive License. Sperry argued that the deductions from arbitral awards were, therefore, a taking of property in violation of the Fifth Amendment.

The Claims Court agreed. Former Chief Judge Kozinski found the Directive License invalid and directed the government to return the fees it had collected from Sperry. May 1, 1985 Bench Ruling, Appendix to Appellant's Jurisdictional Statement ("J.S. App.") 49a. Within three weeks of the Bench Ruling, however, legislation was introduced in the Senate, and enacted in August, that retroactively authorized deductions from Tribunal awards. Thereafter, the government suggested that the action in the Claims Court was moot and sought dismissal of Sperry's claims. Sperry challenged the government's suggestion of mootness on the grounds that the retroactive legislation was unconstitutional.[2] The Claims Court (per newly appointed Chief Judge Smith) found the retroactive legislation constitutional and dismissed Sperry's claims as moot. J.S. App. 25a. Sperry appealed this dismissal and on August 10, 1988, the Federal Circuit reversed the Claims Court finding the legislatively imposed deductions violative of the Fifth Amendment's Takings Clause. 853 F.2d at 909; J.S. App. 11a.[3]

The court of appeals found that the government had embarked on a "confiscatory cost recovery effort" by "seizing a percentage of the awards of the Tribunal" and thus improperly charged successful claimants such as Sperry for the "resolution of the hostage crisis." 853 F.2d at 907-08; J.S. App. 8a. The court acknowledged the President's "broad power to resolve international disputes by settling claims" even on uncertain or disproportionate terms, but noted that the government itself could not then diminish the substitute compensation for those suspended claims by "arbitrarily keeping a portion for itself". 853

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[2] Sperry asserted that the Iran Claims Settlement Act violated the Takings Clause as well as the Due Process and Origination Clauses of the Constitution.

[3] Because the court of appeals found for Sperry on that claim, it did not pass on Sperry's other constitutional challenges. *Id.*

F.2d at 908; J.S. App. 9a. The Government appealed that ruling and on February 21, 1984, the Court noted probable jurisdiction. J.A. 59.

2. The Algiers Accords And Establishment Of The Tribunal. The ruling by the court of appeals accurately reflected the manner in which the President used the pending claims as "bargaining chips" to end the crisis and gain the release of the American hostages. 853 F.2d at 908; J.S. App. 8a. By signing the Algiers Accords, the government obtained the release of the hostages in return for alleviating the extreme economic pressure which was preventing Iran from engaging in commercial operations and which threatened its very survival. As part of the exchange, the United States terminated all proceedings against Iran in the United States courts, nullified all attachments of Iranian property obtained in those proceedings, prohibited further litigation based on such claims, and referred all outstanding claims to the Iran-United States Claims Tribunal for arbitration. J.A. 24-26. It was further agreed that all Iranian assets in this country (approximately $8 billion) would be returned to Iran, except that the United States would direct $3.6 billion to the Federal Reserve Bank in New York and $1.4 billion to a separate escrow account in London, both to satisfy certain bank claims, and then deposit $1 billion of Iranian assets in a security account in Algeria to satisfy awards made by the Tribunal on the non-bank claims. J.A. 26, 33, 44. See *infra* at 41. The two governments also agreed that they would bear equally the costs of operating the Tribunal. J.A. 41. The terms of these agreements, including the dissolution of the attachments and suspension of litigation, were thereafter embodied in various Executive Orders and regulations.[4] Neither the Algiers Accords nor any

[4] 31 C.F.R. § 535.222; Brief for the Appellant ("Br.") 6; R. 43, SMF ¶¶9-11, Exhibits in support of Sperry's Motion for Summary Judgment ("Ex." or "Exs.") nos. 3-5; Ct. App. J.A. 27. "R. ___" refers to the record by way of the numbered entry on the docket sheets included in the Court of Appeals Joint Appendix at 10-18 and in the Joint Appendix here at 1-5. Where the item referenced in the record is in the court of appeals Joint Appendix, the page number within is listed as "Ct. App. J.A. ___". References to the material in the Joint Appendix filed here is "J.A. ___".

of the Executive Orders or regulations provided for any deductions from Tribunal awards.

Many litigants whose actions against Iran were suspended sought to prevent enforcement of the various Executive Orders and Treasury regulations implementing the Algiers Accords, charging that the executive's actions worked an unconstitutional taking in violation of the Fifth Amendment. In *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), the Court upheld the executive's suspension of the litigation and dissolution of the attachments of Iranian property, but only as an "incident to the resolution of a major foreign policy dispute between our country and another". *Id.* at 688. The Court conceded that the President's power was not "plenary" and recognized that "[t]he sheer magnitude of such a power, considered against the background of the diversity and complexity of modern international trade, cautions against any broader construction of authority than is necessary". *Id.* at 688 (quoting *Chas. T. Main Int'l* v. *Khuzestan Water & Power Auth.*, 651 F.2d 800, 814 (1st Cir. 1981)). Although the establishment of the Tribunal was ultimately upheld by the Court, it was viewed as part of the overall settlement of the crisis and was to function as a substitute forum where the claimants could possibly receive something (*i.e.*, compensation) in return for the suspension of their valid commercial claims. *Id.* at 687.[5]

[5] The Court did not reach the issue of whether the suspension of litigation was itself a "taking" in violation of the Fifth Amendment because that issue was not ripe for determination. *Dames & Moore*, 453 U.S. at 689. However, the Court held that such a claim could be asserted in the United States Claims Court under the Tucker Act, 28

As a result of the Court's decision and the Algiers Accords, any American company that wished to pursue a claim against Iran was required to file its claim with the Tribunal established at The Hague no later than January 19, 1982. J.A. 30, 38, 40, 41. Since its establishment, the Tribunal has disposed of jurisdictional arguments relating to some claims, adjudicated governmental and private commercial claims, and approved settlements for payment from the Security Account by issuing "Awards on Agreed Terms." As of June 30, 1988, almost 400 awards had been made.

Sperry made very limited use of the Tribunal's procedures in disposing of its claim against Iran. Sperry commenced settlement negotiations with representatives of the Iranian government in August 1981, and filed its claim at the Tribunal in January 1982, prior to the established deadline. In February 1982, Sperry reached a settlement with Iran calling for payment of $2.8 million to Sperry, R. 49, Ex. 25, with final approval by the Iranian government given on July 8, 1982.[6] Thereafter, Sperry and the Iranian

U.S.C. § 1491, and that such an action would not be barred by the treaty exception, embodied in 28 U.S.C. § 1502, to the Claims Court's jurisdiction. *Id.* at 689-90.

[6] Notwithstanding the record, the government has gone to great lengths to argue that this settlement was not reached until July 1982, suggesting that Sperry could have "eschew[ed]" the Tribunal's "apparatus" and altered the source of payment of the award to take into account the percentage deductions announced in June. Br. 31-32, 20-21. First, it is true that the award ultimately issued refers to the settlement as of July, but the record demonstrates that the agreement was signed by representatives of Iran and Sperry on February 16, 1982 and was ratified by Sperry, effective February 23, 1982. R. 49, Ex. 25 at 1. Only the ratification by Iran was delayed until July. Second, if claims could be filed and settled with payments coming from different sources to avoid the deductions, then claimants could "use" Tribunal services and avoid paying *any* of the so-called user fees. Finally, encouraging claimants to "eschew" the established payment mechanism would violate the government's promise to bring about the termination of pending claims *by way* of the Tribunal's procedures. J.A. 30.

government filed a joint application to have the settlement entered as an "Award on Agreed Terms." The award was entered on September 14, 1982, as amended on September 22, 1982. J.A. 20-24. The amount of the award, less the two percent deducted and paid to the Treasury, was forwarded to Sperry in October. R. 43, ¶¶ 23-24.

3. Treasury's Directive License. In June 1982, six months after the January filing deadline, Treasury issued its Directive License authorizing the Federal Reserve Bank of New York to deduct two percent from funds representing every Tribunal award (contested or agreed) transferred to it from the Security Account, prior to transferring the funds to the appropriate claimant. Ct. App. J.A. 39. The Directive License was issued purportedly to reimburse the government for the costs of operating the Tribunal. *Id.* Although the State Department had issued more than a dozen notices providing guidance and encouraging claimants to file their claims at the Tribunal in advance of the filing deadline,[7] the government did not announce its in-

[7] *See, e.g.*, 47 Fed. Reg. 22361 (May 24, 1982) (information on Tribunal procedures); 47 Fed. Reg. 8118 (Feb. 24, 1982) (information on Tribunal's rules); 47 Fed. Reg. 1063 (Jan. 8, 1982) (advising of filing deadline and encouraging filing); 47 Fed. Reg. 366 (Jan. 5, 1982) (same); 46 Fed. Reg. 59939 (Dec. 7, 1981) (registration of bank claims—against which no deductions were ever assessed); 46 Fed. Reg. 58631 (Dec. 2, 1981) (procedures applicable to filing of and hearings on claims); 46 Fed. Reg. 57812 (Nov. 25, 1981) (information on filing and registering small claims on State Department Form DSP-93); 46 Fed. Reg. 55467 (Nov. 9, 1981) (procedures applicable to filing of and hearings on claims); 46 Fed. Reg. 49695 (Oct. 7, 1981) (procedures applicable to filing claims); 46 Fed. Reg. 45057 (Sept. 9, 1981) (general information on operation of Tribunal, establishment of the Security Account, rules of procedure, etc.); 46 Fed. Reg. 37418 (July 20, 1981) (information on Tribunal's directives and filing claims); 46 Fed. Reg. 36277 (July 14, 1981) (registration and procedures for settling claims); 46 Fed. Reg. 25584 (May 7, 1981) (information on settling claims with Bank Markazi); 46 Fed. Reg. 25026 (May 4, 1981) (information on registering and settling claims). *See also* State Department Form DSP-93 ("Iranian Claims: Registration Form") (no reference to any deductions).

tention to reimburse itself for the costs of operating the Tribunal until six months *after* the filing deadline.[8] This was completely unforeseen by Sperry as it must have been by Congress. After the President signed the Algiers Accords, Congress neither expressed its disapproval nor "enacted legislation or even passed a resolution indicating displeasure with the [Accords]," 453 U.S. at 687, including the government's agreement to be responsible for the costs of operating the Tribunal.

Sperry protested the contemplated two percent deduction from its Tribunal award and after Treasury rejected the protest, Sperry commenced an action on behalf of itself, and those similarly situated, to recover fees illegally deducted from their Tribunal awards. J.A. 9. The Claims Court ultimately found the Directive License invalid and directed that the deductions be returned. J.S. App. 48a-49a.[9]

Although the Directive License listed a number of purported authorities for the two percent deductions, the Claims Court found that the only potential authority was the Independent Offices Appropriation Act, 31 U.S.C. §§ 9701 *et seq.* ("IOAA"). J.S. App. 31a. The Directive License, however, did not comply with the IOAA's re-

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[8] The government stretches the facts when it states that the Directive License was issued *before* the payment of any award in favor of a U.S. claimant was made. Br. 7. The Directive License was issued on the *very same* day payment of the first award was scheduled to be made. Mot. Dis. or Aff. App. 10a; Ct. App. J.A. 39. By that date, three awards had already been rendered in favor of U.S. claimants. R. 49, Ex. 22 at 1.

[9] The Claims Court initially denied Sperry's motion for class certification. Br. 9 n.9. The government's brief omits that this denial was on the grounds that the class was not sufficiently numerous. Ct. App. J.A. 55. Sperry moved for class certification again when the class had expanded (and as of the May 1985 Bench Ruling was approximately 175) but the court did not rule on the motion which is still pending. J.S. App. 49a.

quirements for establishing a schedule for collection of reasonable fees to reimburse various costs, and instead resembled an unlawful executive tax. J.S. App. 41a. Although the Claims Court did not invalidate the Directive License because it was issued without notice or opportunity for comment, the court found that there were "serious substantive problems" with the deductions and that none of the government officials devoted an "appropriate amount of consideration" to establishing a proper fee schedule. J.S. App. 34a. In particular, the Claims Court found that Treasury improperly sought to recover costs of other agencies, J.S. App. 35a-37a; that there was absolutely nothing to justify the amounts to be deducted, the costs to be reimbursed, or any effort made at allocating costs and benefits, J.S. App. 37a-40a;[10] that costs were allocated only to a portion of the claimants at the Tribunal, J.S. App. 41a-42a; that costs were assessed for services that were not even used by many claimants, J.S. App. 42a; and that the percentage fee was "suspect" itself and "counter-intuitive" as no rational basis was put forward to justify a fee which varies with the amount of the award, J.S. App. 42a-45a. The Claims Court was not at all persuaded that the government had made any effort to think out the fees or to justify the Directive License—as "everybody was in a rush", J.S. App. 45a—and found that the IOAA cost/benefit issues were never actually considered, J.S. App. 46a. The Claims Court therefore found the Directive License invalid and the deductions unauthorized, and announced its intention to enter judgment for Sperry. J.S. App. 48a.

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[10] "What we have here is *nothing*—absolutely *nothing*. And [the government] who is in the best position to come forward with something, if there were, has come up with *nothing*." J.S. App. 37a-38a (emphasis added). Further, in its cost-recovery quest, the government did not seek to assess deductions on any payments made on bank claims. *See infra* note 49.

The Court issued its ruling from the bench on May 1, 1985, but withheld writing an opinion to give government counsel time to consult and possibly resolve the matter by settlement. J.S. App. 50a. Although it was agreed at the subsequent status hearing on May 14, 1985, that a written opinion was warranted, the government immediately sought legislation, introduced three days later in the Senate as The Iran Claims Settlement Act, which would retroactively authorize deductions from all arbitral awards issued by the Tribunal for the prior three years, back to June 7, 1982. Ct. App. J.A. 94; 131 Cong. Rec. H6489 (daily ed. May 17, 1985).

4. The Iran Claims Settlement Act. While it is true that Congress "reacted immediately", Br. 9, the 1985 legislation was actually the third time the executive sought congressional action on the subject of deductions from Tribunal awards.[11] However, less than three weeks after the Claims Court's Bench Ruling in May 1985 (some two years after the last failed attempt at legislation) the government again sought relief from Congress. This time Congress delivered.[12] In enacting legislation specifically designed to overturn the Bench Ruling, however, Congress did not determine that a "user fee" was at all times appropriate or even justified; indeed, it expressly acknowledged that charging for the costs of the Tribunal was "controversial." Ct. App. J.A. 95. Yet, Congress was preoccupied with retaining those funds already wrongfully collected from the non-bank claimants, even though it would be retroactively authorizing illegal administrative action:

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[11] On two other occasions subsequent to the issuance of the Directive License, the executive sought legislation to retroactively authorize the two percent deductions. R. 43, Exs. 18 and 21 at 5g, R. 43, SMF ¶¶48-49. None of this prior legislation ever made it to the floor of either chamber.

[12] The Iran Claims Settlement Act was designated as Section 502 of the Foreign Relations Authorization Act, fiscal years 1986 and 1987, and appears at 50 U.S.C. § 1701 note.

> The validity of [the Directive License] has been challenged in the U.S. Claims Court. The chief judge of that court recently indicated his intent to enter a decision adverse to the United States. *As a result, without our legislation, the entire amount collected to date would be subject to refund by decisions of that court.*
>
> Our legislation would ensure that the bulk of the amounts recovered to date, over $6 million, would remain in the Treasury. Further, it would guarantee that an additional $12 to $20 million in revenues, which the Department of State estimates would be collected under our bill, would go into the Treasury to offset the deficit.

Ct. App. J.A. 95. (emphasis added).

Consistent with prior cost recovery efforts, the government focused on raising revenue rather than complying with constitutional requirements. The Tribunal and its processes did far more than provide a forum for the resolution of the claims of Sperry and others who did business with the Iranians. The termination of extraordinary tensions created by Iran's seizure of the hostages and resolution of a most difficult international crisis were the genuine purposes behind the Accords and the establishment of the Tribunal. The "deluge of claims exerted considerable pressure on the Iranian government, and gave the United States a powerful tool in the negotiations for the release of the hostages."[13] Iran's demands for the return of the hostages included the cancellation of all commercial claims being litigated in U.S. courts. 80 Dep't St. Bull. No. 2045 at 46-47 (Dec. 1980). Only when these con-

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[13] Note, *Dames & Moore v. Regan—Rights in Conflict: The Fifth Amendment Held Hostage*, 31 Am. U.L. Rev. 345, 384 (1982) [hereinafter *"Rights in Conflict"*].

ditions were fulfilled would Iran release all 52 U.S. citizens. *Id.*

Thus, foreign policy was central to the decision to suspend and refer these claims to the Tribunal. "In relieving foreign debtors from their obligations in order to protect the lives of American nationals and end an embarrassing international crisis, the government served public, as opposed to institutional objectives."[14] Thus, there is no doubt that foreign policy implications were paramount. "[T]he establishment of the Tribunal [was] 'of vital importance to the United States' ". 453 U.S. at 688 (quoting S. Rep. No. 97-71 at 5 (1981)) (Mot. Dis. or Aff. App. 7a).

The suspension and referral to arbitration of private American claims clearly was not motivated by a sense of altruism. Rather, it reflected our government's implicit obligation to protect private property and a concession to the Iranian government's demands. Our government had strongly encouraged international trade with Iran, even establishing a "Joint Commission" to promote significant private commercial trade with Iran as part of U.S. foreign policy.[15] Iran was seen as a secure trading partner and

[14] Brownstein, *The Takings Clause and The Iranian Claims Settlement*, 29 UCLA L. Rev. 984, 1039 (1982) [hereinafter "Brownstein"]. Senator Evans implicitly recognized this when he stated that some of the benefits flowing from the establishment and operation of the Tribunal inured directly to the government and thus could not be charged to private claimants. Ct. App. J.A. 95. Congress also never considered the cost savings in having more than 2,000 pending cases suspended and referred to the Tribunal. *Cf.* Ct. App. J.A. 122 (State Department's belief that U.S. would not have suffered "substantial additional expenses" had all litigation proceeded in the U.S. courts). Nonetheless, Congress never calculated the extent of these public benefits and made no attempt to reasonably allocate any of the associated costs.

[15] 74 Dep't St. Bull. No. 1929, at 760 (June 14, 1976) (Sober Statement). "As much as anywhere in the world, *United States commercial and other economic activities in the Middle East are essential elements of our foreign policy.*" *Id.* at 760 (emphasis added). There existed tremendous opportunities for American firms in Iran, given Iran's scheduled $70 billion in total trade for 1973-1978, with United States/Iran trade targeted at $26 billion. *Id.* "In the broadest sense, *the opportunities for trade*—imaginatively and energetically pursued by American business—can spell a success story that *will serve the interests of the United States in many ways.*" *Id.* at 763 (emphasis added). *See also* 75 Dep't St. Bull. No. 1941, at 314 (Sept. 6, 1976) (communique of Iran-U.S. Joint Commission on Cooperation setting goal of $40 billion in non-military trade for 1975-80); 78 Dep't St. Bull. No. 2013 (April, 1978) (communique of U.S.-Iran Joint Commission recognizing potential for further expansion of commercial relations).

increased trade was encouraged to allow the U.S. to regain billions in "petrodollars" flowing to Iran and other Middle Eastern countries as a result of the Arab oil embargo and drastic increases in the price of oil in the 1970s.[16] Overnight, the Middle Eastern oil suppliers changed from debtor to creditor nations and expansive trade would insure a degree of return investment of Iran's oil revenues.[17] Expanding commercial relations with Iran served the U.S. government's interests in assuring security of the vital oil routes and maintaining U.S. access to the area's oil at reasonable prices.[18]

When confronted with the seizure of American citizens and a hostile takeover of the government of this once-friendly trading partner, the President had a strong "bargaining chip" and froze more than $4 billion in Iranian assets here to protect U.S. commercial interests and to

[16] *See generally* 71 Dep't St. Bull. No. 1836, at 335-342 (Nov. 2, 1974). American firms were not venturing into hostile territory or deliberately seeking risky investments. Rather, American firms were directed to Iran because it had a "military supply" relationship with the United States and shared with Saudi Arabia the primary responsibility for ensuring stability in the Gulf. *Id.* at 336. Similarly, the Treaty of Amity guaranteed the absolute protection of private property in Iran and guaranteed access to the courts to resolve commercial disputes. Treaty of Amity, August 15, 1955, United States-Iran, arts. III, IV, 8 U.S.T. 899, T.I.A.S. No. 3853.

[17] 71 Dep't St. Bull. at 336, 339.

[18] *Id.* at 336-337.

exert considerable economic pressure on Iran for the hostages' release.[19] When Iran conditioned its release of the hostages on the satisfaction of its commercial demands, the President sent all the assets back and suspended the commercial claims in order to end the crisis.[20] The establishment of the Tribunal to hear the suspended claims was thus integral to the final resolution of the hostage crisis.

SUMMARY OF ARGUMENT

The details of Iran's seizure and detention of the American hostages were reported daily to the public and the situation gripped our nation for well over a year. The resolution of the international crisis by the exchange of the hostages for the frozen assets and suspension of claims ended the prolonged and inhumane detention of American citizens, brought about a degree of normalization of diplomatic relations and restored national pride. The resolution of this crisis was necessary—and the process by which the crisis was settled necessarily elaborate—but the laudatory ends do not justify the arbitrary imposition of the costs on a few for the benefit of the entire country.

The claims arising from the foreign investments of Sperry and other claimants were used as "bargaining chips" and moved from one forum to another against their

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[19] When ordering the freeze, the President stated that the freeze was "to insure that claims by the U.S. and its citizens are provided for in an orderly manner." Int'l Trade Rep. Exp. Weekly (BNA) No. 283 (Nov. 20, 1979) A-1. After the freeze, the President stated that the assets "will be available to satisfy contract and other commercial claims of American firms against Iranian government entities. . ." 80 Dep't St. Bull. No. 2038, at 8 (May, 1980) (Presidential news conference). *See also* text accompanying note 13, *supra*.

[20] Iran's demands for the release of hostages included unfreezing the assets, returning them to Iran, and *abrogating and cancelling all U.S. litigation*; Iran demanded as well that the U.S. government undertake and guarantee to pay any compensation arising from the cancellation of claims. 80 Dep't St. Bull. No. 2045, at 46 (Dec. 1980).

collective will. The government may not now take a portion of the award that was intended as "just compensation" for the suspension of pending claims and further reduce it in the manner it has chosen. Allowing such arbitrary deductions would imply that international commercial claims exist only in the discretion of the President. The claims arising from Sperry's and other American firms' commercial contracts with Iran are not beyond the protection of the Takings Clause. The government is *not* free to appropriate all or whatever percentage of Tribunal awards it chooses. Charging the successful claimants at the Tribunal with the costs of settling the hostage crisis does not comport with modern notions of international trade. "[T]he Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by relatively few persons and subject to the jurisdiction of our courts." *Dames & Moore*, 453 U.S. at 691 (Powell, J., concurring) (footnote omitted). When these claims are not fully paid, the claimants have a cause of action against the government under the Takings Clause of the Constitution. *Id.* The court of appeals correctly found that the deductions deprive claimants of their legitimate and constitutionally protected property interests.

The prior attempt by Treasury to illegally assess deductions against arbitral awards did not create an opportunity for congressional intrusion. Nevertheless, Congress made clear its intention not only to provide retroactive authorization to upset the Claims Court's judgment, but to change substantively legislative policy and authorize in part the previously unauthorized collection of fees. Importantly, Congress was not exercising or delegating its taxing power, rather it was legislating unequivocal authority to retain money previously collected illegally. Ct. App. J.A. 95. This was a complete change in policy: the Algiers Accords and Tribunal rules provided for the *governments* of Iran and the United States to share the Tribunal's

expenses. J.A. 41; 2 U.S.C.T.R. 405, 438 (1983). Further, the Executive Order provided for discharge of claims only upon *full payment* of Tribunal awards to claimants, as confirmed in subsequent regulations. Mot. Dis. or Aff. App. 3a-4a; 31 C.F.R. § 535.222. Finally, Congress made clear that due to the "vital importance" of the Tribunal to the United States, the State Department was to devote sufficient personnel and *its* resources to enable the U.S. to effectively and expeditiously represent the interests of American citizens before the Tribunal. Mot. Dis. or Aff. App. 7a. Thus, eighteen months after settling the hostage crisis, six months after the deadline for filing claims at the Tribunal and on the day of the payment of the first Tribunal award, Treasury unilaterally, but unconstitutionally, sought to change policy. Congress's retroactive authorization of this conduct cannot withstand scrutiny.

The scheme of deductions also fails to satisfy concepts of equal protection. Where the Act purports to recover the costs of operating the Tribunal, it fails to charge all who incurred those costs. Thus, even if it were appropriate to charge "user fees", the assessments do not achieve the intended result, as only *successful* users have been made to pay. The deductions do not vary with or even depend upon actual usage. Further, the failure of the government to assess deductions against the banks (which recovered *in full* on their claims) also discriminates against the narrow class of non-bank successful claimants. These non-bank claimants, such as Sperry, have unfairly borne the entire brunt of the government's cost recovery efforts.

Because the deductions are also designed to raise revenue for the operation of the government, the Constitution required legislative authorization to originate in the House of Representatives. Here, however, the Act was initiated in the Senate and, despite any argument to the contrary, the revenue raising provisions in the Act have absolutely *nothing* to do with any of the other provisions of the Act or the Authorizations Bill of which it is a part. The failure

to initiate the legislation in the House, as required by the Origination Clause, renders the Act unconstitutional on this additional ground as well.

ARGUMENT

I. THE IRAN CLAIMS SETTLEMENT ACT VIOLATES THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT BECAUSE IT LEGISLATIVELY IMPOSES THE COSTS OF SETTLING THE HOSTAGE CRISIS ON THOSE AMERICAN NATIONALS WHOSE COMMERCIAL CLAIMS AGAINST IRAN WERE SUSPENDED IN EXCHANGE FOR THE RELEASE OF THE HOSTAGES

A. After Forcing American Nationals With Pending Claims To Proceed At The Tribunal, The Government Could Not Then Assess Deductions Against Any Tribunal Award

The underlying claims against Iran processed at the Tribunal were commercial claims, most of which had been secured by substantial attachments on frozen Iranian assets in this country. The assets attached were originally stated to be available for the purpose of paying the commercial claims of the American companies whose contracts had been broken and property taken when Iran seized the hostages and broke off commercial and diplomatic relations. *See supra* note 19. The Federal Circuit agreed with Sperry's argument that the suspension of the commercial claims was part of the overall resolution of the hostage crisis, the costs of which the government could not then force Sperry to assume by way of deductions from Tribunal awards. J.S. App. 11a. The court also agreed that the appropriate analysis was that of a *per se* taking. J.S. App. 5a-6a. There is no debatable question that the claims and the awards based on those claims are the property of claimants, such as Sperry, and that payments on those

claims have been confiscated as part of the government's cost recovery efforts.[21]

In its brief, however, the government embarks on an extended analysis of the historical conduct of foreign relations, Commerce Clause "user fee" cases, and whether claimants may be said to have "expected" as well as "benefitted" from the government's intervention. In fact, the entirety of the government's argument rests on its broad assertion that these deductions are proper because they may be considered user fees. The government's analysis fails in all respects.

The government repeatedly suggests that the deductions from the Tribunal awards were "modest" in amount, and "reasonable", given Sperry's "voluntary" use of the Tribunal. Br. 25, 27, 30 and 31. However, Sperry was *forced* to use the Tribunal by the terms of the Algiers Accords, and the modesty of an illegal exaction is not part of any prescribed analysis. The government wrongly asserts that it is merely "passing on the reasonable cost of a government program that redounds to the special benefit" of claimants such as Sperry. Br. 27. The claims of reasonableness for the deductions are completely without support. Realizing that, the government then urges the Court not to demand "reasonableness", invoking the shield of decisions construing Congress' *taxing power*, notwithstanding that Congress never purported to exercise its taxing power. Br. 25-26. This apparent confusion is not accidental, as noted below, and is created so as to allow a deduction

[21] Initially, the government argued that claimants had no property interest in any of the awards of the Tribunal. However, if the awards had been the property of the U.S. government and their payment to the U.S. nationals was in the absence of express congressional authorization, the government officials could have been exposed to criminal liability under 18 U.S.C. § 641. The government subsequently conceded that "funds received from the Security Account in payment of Tribunal awards are *not* public monies." R.61 at 20. *See also* J.S. App. 28a.

masquerading as a "user fee" to sneak by as a "tax." *See* J.S. App. 10a-11a.[22]

Although the President had the statutory authority to nullify attachments and transfer previously frozen assets out of the country, *Dames & Moore*, 453 U.S. at 674, the suspension of claims, not directly authorized by statute, was justified under general principles of executive power in the area of foreign affairs. *Id.* at 678-80. Implicit in the authorization of this executive action was the presence of the alternative forum and a remedy in the Claims Court to redress any claim that the suspension of litigation in the United States courts or the non-payment or reduction of awards was a taking in violation of the Fifth Amendment. "[T]o the extent petitioner believes it has suffered an unconstitutional taking by the suspension of the claims, we see no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act." *Dames & Moore*, 453 U.S. at 689. As Justice Powell further reasoned in his concurrence:

> The [majority] opinion makes clear that some claims may not be adjudicated by the Claims Tribunal, and that others may not be paid in full. The Court holds that parties whose valid claims are not adjudicated *or not fully paid* may bring a 'taking' claim against the United States in the Court of Claims, the jurisdiction of which this Court acknowledges. The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips'

[22] The government's effort at justifying the fee is completely confused. It seeks to justify *Congress's* actions here as a "reasonable exercise" of its power under the Necessary and Proper Clause to "effectuate" the *President's* foreign relations authority. Br. 23. The fact that the President *had no authority* to assess deductions against Tribunal awards was the sole reason Congress became involved. J.A. 95. Further, there was nothing to "effectuate" as the Tribunal had been established and running for over three years *before* Congress got involved.

> claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts. *The extraordinary powers of the President and Congress upon which our decision rests cannot, in the circumstances of this case, displace the Just Compensation Clause of the Constitution.*

453 U.S. at 691 (footnotes omitted) (emphasis supplied). The Court thus recognized claimants' property interests in suspended claims and the constitutional limits on the executive's exercise of this power to suspend the claims.

The government's general power over the disposition of foreign claims must not be confused with the ownership of those claims. The power to suspend claims clearly does not give the government the right to take property without compensation. *Dames & Moore*, 453 U.S. at 688-90. For example, in *Gray* v. *United States*, 21 Ct. Cl. 340 (1886), the Court of Claims construed the United States government's settling of private claims against the French government to be a taking because the settlement took those claims for the "public use" of solving the problem of "strained relations" with France. *Id.* at 393. Even in that era when the government had the *right* to settle claims of its citizens against a foreign sovereign, that right was not without limits; a citizen whose claims are "sacrificed for the safety and welfare of his country has his claim against that country; *he has a right to compensation, which exists even if no remedy in the courts or elsewhere be given him.*" *Id.* at 392-93 (emhasis added). *See also Meade* v. *United States*, 2 Ct. Cl. 224, 275 (1866), *aff'd on other grounds*, 76 U.S. (9 Wall.) 691 (1869) ("A man's *choses* in action, the debts due him [from a foreign sovereign], are as much property and as sacred in the eye of the law as are his houses and lands, his horses and his cattle. And when taken for the public good, or released or cancelled to secure an object of public importance, are to be paid for in the same manner.").

Sperry's and other claimants' constitutionally protected right of access to the courts—the right to have their commercial claims litigated in the courts of this country—could not be arbitrarily abridged.[23] Parties are entitled "to rely on the continued existence of adequate statutory remedies for enforcing their agreement". *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 19 n.17 (1977). The government's claim that it has the authority to diminish those claims by deducting a portion for the Treasury makes a mockery of the Tribunal's establishment and this Court's ruling that Tribunal awards would be the "just compensation" for the suspension of claims. "There can . . . be no doubt that the compensation must be a *full* and perfect equivalent for the property taken", and the final determination of compensation rests with the judiciary *not* the executive. *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326-27 (1893) (emphasis supplied). The court of appeals recognized this precept. "[W]hen the President has divested [claimants] of full judicial remedies in federal courts as here, the government cannot diminish the substitute compensation of the alternative forum by arbitrarily keeping a portion for itself." J.S. App. 9a.[24] The govern-

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[23] *See Dames & Moore*, 453 U.S. at 691. *See also Chambers* v. *Baltimore & O.R.R.*, 207 U.S. 142, 148 (1907) (access to the courts is a fundamental constitutional right). The authority to enter into international agreements that may affect private interests does not thereafter insulate the government from the consequences of unconstitutional conduct in carrying out its treaty obligations. *Reid* v. *Covert*, 354 U.S. 1, 16 (1957).

[24] The federal district courts, where the majority of the "bargained" claims were pending, do not assess fees on judgments for the costs of adjudicating or settling claims. "[N]o deduction is assessed in the United States district court, whose jurisdiction Sperry had a right to invoke, but it was extracted from the Tribunal award, purportedly the substitute for a court judgment." J.S. App. 10a. At least as to Sperry, this is important. Sperry and the Iranians settled their claims for an *agreed* amount. The U.S. district courts make no deductions against settlements reached by litigants before them. Whatever the reason, Congress

ment's reliance on decisions such as those in the *Head Money Cases*, 112 U.S. 580 (1884), Br. 23, is entirely misplaced. In the *Head Money Cases*, the taxes were upheld as an exercise of Congress's power to "regulate commerce with foreign nations" and to create a special fund for the care of indigent immigrants. *Id.* at 600. The deductions here do not "regulate commerce" with Iran or any other nation, so that the international commmerce power is not implicated in the least.[25] By trading in foreign commerce, Sperry and others did not submit to some unchecked, roving, revenue-raising authority which Congress was free to exercise under the guise of "regulating" foreign commerce. Br. 23. Perhaps in earlier times, this concept had some legitimacy; however, with the enactment in 1976 of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1601, *et seq.* ("FSIA") it does not.

The FSIA was intended to depoliticize the jurisdictional question of immunity for foreign states, which had depended on executive involvement, and thus avoid diplomatic interference with international business transactions. *Dames & Moore*, 453 U.S. at 943; Brownstein, *supra* note

in its wisdom chose not to assess revenue-related fees in the U.S. courts.

[25] As support for its contention, the government claims the deductions were part of the "regime" of the Algiers Accords, and an "integral component" of the overall scheme for the *arbitration* and *payment* of claims against Iran, and Congress merely ratified the "mechanism" for resolving and paying claims. Br. 22, 30, 40. To the contrary, the deductions illegally imposed by Treasury and subsequently embodied in the Act were not part of any overall scheme and had absolutely nothing to do with any of the Tribunal's operations or the mechanism for paying awards from the Security Account in the Netherlands. The deductions are assessed in New York and were imposed by Congress four and one-half years after the Algiers Accords. Although the government urges this construction and the Act makes reference to "facilitating" operations of the Tribunal, the Court must look beyond this language to the nature of the deductions in determining their constitutionality. *See United States* v. *LaFranca*, 282 U.S. 568, 572 (1931).

14, at 1063. Indeed, the passage of the FSIA signaled an end to executive interference in asserting claims against foreign entities and promised judicial determinations of immunity and proper adjudication of commercial claims in federal courts. "A principal purpose of [the FSIA] is to . . . reduce[ ] the foreign policy implications of immunity determinations and assure[ ] litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 7, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6606. Treating suspended commercial claims as subject to the unbridled control of the executive *denies* due process and *re*politicizes enforcement of these commercial claims.

Although the FSIA may not estop the government so as to prevent any intrusion whatsoever into the claims adjudication process, the government's conduct in promoting trade and making available a non-political forum led "to the fruition of a number of expectancies embodied in the context of 'property'—expectancies that, if sufficiently important, the government must condemn and pay for before it [assumes control]." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179 (1979). With the passage of the FSIA, the need or expectation of the executive's intrusion into the claims adjudication process was reduced if not eliminated; indeed, it announced that the nation's foreign policy would no longer directly impact adjudication of private commercial claims.[26] Practice under both the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1702(a) and Trading with the Enemy Act ("TWEA"), 50 U.S.C. app. § 5(b)(1) support this conclusion. Brownstein, *supra* note 14, at 1064-69.

[26] With the enactment of the FSIA, the executive's asserted authority to espouse or settle commercial claims or otherwise interfere with the investment expectations of U.S. nationals trading internationally essentially disappeared. *See generally Rights in Conflict*, *supra* note 13, at 364-65, 378 & n.259, 380.

The government wrongly characterizes Sperry's expectations in this regard as one of a "cost-free" forum. Br. 33. Sperry readily expected the usual district court filing fee and was forced to pay added costs of traveling to The Hague and obtaining Farsi translations of hundreds of pages of documents before filing its claims at the Tribunal. Yet, the expectation that the government may intervene, an expectation confronting domestic as well as foreign investors, does not then justify a seizure of a portion of the Tribunal award or make compensation less appropriate where private interests are sacrificed for the benefit of foreign relations. As a commentator presciently noted shortly after the passage of the FSIA but before the Iranian hostage crisis:

> Assume American hostages are being held by a foreign government. While negotiating for their release, the United States government wishes to offer as a quid pro quo the termination of pending litigation against the nation within this country. Under the FSIA, *the executive would have no such authority. . . .*[27]

This comports with current accepted notions of international trade, especially as it applies to trade with Iran.

> With the demise of the doctrine of absolute foreign sovereign immunity, fifth amendment protection for the domestic litigant who pursues a claim against a foreign sovereign should begin to approach the protection accorded in litigation between domestic parties. As international economic interdependence increases, greater certainty is needed in international claims litigation. In addition, the United States will continue to depend upon unfriendly or unstable countries for essential raw materials, and there will be a corresponding need to encourage investment abroad. *Corporations must be assured that their investments will not be subject to the unbridled control of the Executive, or that if their interests are compromised, they will be justly compensated.* If these assurances are not forthcoming, the resulting disincentive may hinder the ability of the United States to participate vigorously in international commerce.

Rights In Conflict, supra note 13, at 381 (footnotes omitted) (emphasis supplied).

The government's efforts to charge the costs of settling the crisis—the costs of utilizing Sperry's and others' claims as "bargaining chips" to resolve the hostage crisis—means that the claims are "not fully paid", resulting in a taking of Sperry's property. "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).[28] This was not a situation in which the multi-factor test used in reviewing regulatory takings would be appropriate.[29]

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[27] Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 Sw. L.J. 1009, 1063 (1979) (emphasis added), *quoted in* Marks & Grabow, *The President's Foreign Economic Powers After Dames & Moore* v. *Regan: Legislation by Acquiescence*, 68 Cornell L. Rev. 68, 94 n.165 (1982).

[28] This concept especially applies here where the property is being taken for the "public use" of achieving substantial foreign policy objectives. *Dames & Moore*, 453 U.S. at 691 n.2. *See also E-Systems, Inc.* v. *United States*, 2 Cl. Ct. 271, 275 (1983) ("There is no more persuasive reason why [the reasoning in *Armstrong*] should not apply in achieving a national purpose or benefit in the field of foreign policy than in the accomplishment of any other lawful national purpose or benefit").

[29] Because the taking of Sperry's $42,000 was a permanent "occupation" and not a "temporary physical invasion" of Sperry's property,

In that vein, the court of appeals correctly analogized the government's taking here to the illegal exaction in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980); J.S. App. 6a. There, the Court struck down a state law that appropriated all interest on funds deposited in its registry to the state, ostensibly because the funds assumed the status of "public money." However, while noting the general permissiveness in upholding governmental action in taking property to promote the general welfare, the Court held that the state government had "not merely 'adjust[ed] the benefits and burdens of economic life to promote the common good.' Rather, the exaction [was] a forced contribution to general governmental revenues, and it [was] not reasonably related to the costs of using the courts." 449 U.S. at 163 (citation omitted). Here, as well, nothing was put in the record to show that the "exaction" was "reasonably related" to the costs of using the Tribunal. The obligation to discharge foreign policy interests is that of the government. Satisfying the attendant expenses by deductions from private arbitral awards violates that principal and renders the legislation invalid.

Nonetheless, the government suggests the "modesty" of the exaction allows it to survive constitutional scrutiny and

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the "size" of the occupation or how "minimal" the economic impact was had no relevance. J.S. App. 6a; *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35, 438 n.16 (1982). Where there is a permanent physical occupation of property, rather than a temporary invasion, there is no inquiry into the *extent* of diminution; that inquiry is only appropriate under the general multifactor test applicable to nonpossessory governmental activity. J.S. App. 5a. *See Loretto*, 458 U.S. at 432, 438-440; *Shanghai Power Co.* v. *United States*, 4 Cl. Ct. 237, 242 (1983), *aff'd mem.*, 765 F.2d 159 (Fed. Cir.), *cert denied*, 474 U.S. 909 (1985). *See also* J.S. App. 9a; *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987) (only where no physical occupation occurs may a court conduct a multifactor inquiry). Thus, the regulatory takings cases relied on by the government are completely inapposite. *See* Brownstein, *supra* note 14, at 1018-19; *amicus* brief of Pacific Legal Foundation.

that the government may legislate "adversely" to economic values and need not match values of benefits and taxes. Br. 25-26.[30] In any event, the exercise of the taxing power is clearly subject to the strictures of the fifth amendment. *See, e.g., Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 589 n.20 (1935); *Norwood* v. *Baker*, 172 U.S. 269, 278-79 (1898). Congress may have a noble objective in reducing the deficit, but that objective does not support a special assessment against arbitral awards.

> [M]any of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, 'a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.'
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> *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 107 S. Ct. 2378, 2389 (1987) (quoting *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 416 (1922)).

Even when Congress has been "confronted with fiscal and economic problems" of a far greater magnitude than presented here, this Court has not hesitated to hold Congress to the constitutional limits of its power. *Bowsher* v. *Synar*, 478 U.S. 714, 736 (1986). In another decision striking down a one-house legislative veto provision, the Court held that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the pri-

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[30] Congress never claimed the taxing power as authority for the deductions, nor did it follow its own rules for enacting tax legislation, as such must be referred to committees other than the foreign affairs committees. *Rules of the House of Representatives*, Rule X; *Standing Rules of the Senate*, Rule XXV. *See also infra* note 36.

mary objectives—or the hallmarks—of democratic government". *INS* v. *Chadha*, 462 U.S. 919, 944 (1983). Sustaining the fee here means sustaining a far greater power to take up to the full value of a citizen's property for purposes perceived by the executive and Congress as "governmental interests of the most compelling order." Br. 19. And, unlike the one-house legislative veto invalidated in *Chadha*, striking down this ill-advised cost-recovery effort will not be the "death-knell" for other cost-recovery strategies, as no other "user fee" statute has any of the revenue-related features that preclude an arbitral deduction from being considered a legitimate user fee. *See Chadha*, 462 U.S. at 967 (White, J., dissenting).

B. The Deductions Imposed Against The Tribunal Awards Are Not "User Fees"

The government's characterization of the deductions as "user fees" under various Commerce Clause cases provides no help. Br. 25-27. Even were we to indulge the analogy in this context, the deductions here do not qualify as user fees because the amount of the fee bears *no* relationship to Sperry's activities at the Tribunal; it does not vary directly with the *use* of the Tribunal and does not "even purport to approximate fairly the cost or value of the use" of the Tribunal. *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266, 290 (1987). *See also Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 626 (1981) (measure of tax must be reasonably related to extent of use). Curiously, the government suggests that neither the court of appeals nor appellees "have disputed Congress's determination that the fee constitutes 'a fair approximation of costs of benefits supplied' ". Br. 27 (quoting *Massachusetts* v. *United States*, 435 U.S. 444, 463 n.19 (1978)). To the contrary, the absence of any such "approximation" has been at the core of Sperry's arguments, and the court of appeals found the government's assertion that the deductions were user fees "improbable." J.S. App. 11a (relying on *Massachusetts*

v. *United States*).[31] Nothing in the legislative history or the Act ever discloses that Congress made any determination that the fees approximated the costs of any benefits. More to the point, the government has conceded it could not structure a deduction to satisfy the "cost-benefit" nexus required for a legitimate agency user fee. Ct. App. J.A. 170.

The requirement for such a nexus is not "an IOAA idiosyncracy" and no cases supporting "user fees" have been cited "in which the requirement of a nexus between costs and benefits has not been imposed." *Florida Power & Light Co.* v. *United States*, 846 F.2d 765, 779 n.7 (D.C. Cir. 1988), *cert. denied*, 57 U.S.L.W. 3722 (May 1, 1989) (Starr, J., dissenting).[32] Because Sperry used little of the procedures, and others used far more, and the tax does

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[31] In *Massachusetts* v. *United States*, 435 U.S. 444 (1978), user charges resembling taxes were sustained because *every* airplane "that flies in the navigable airspace of the United States has available to it the navigational assistance and other special services supplied by the United States." 435 U.S. at 468 (footnote omitted). The "losers" at the Tribunal, who paid no such "fee", not only had the services available, but used them and incurred governmental costs. J.S. App. 42a.

[32] Agencies, of course, must abide by the IOAA requirements of establishing a cost/benefit relationship based on actual use when promulgating fee schedules. Likewise, Congress, even when legislating user fees, has prescribed standards reflecting the costs of benefits supplied; it has not directed that such charges be based on a user's "profit" or "success" in using an agency's services. *See, e.g.*, 7 U.S.C. § 16a(c) (fees imposed by the CFTC for its services "shall not exceed the actual cost thereof to the Commission."); 7 U.S.C. § 2242a(b) (fees imposed by Secretary of Agriculture shall be consistent with IOAA); 16 U.S.C. § 4601-6a(d) (recreation user fees take into consideration costs, benefits, public interest served, and other factors); 26 U.S.C. § 7801 note (Pub.L. 100-203, Title X, § 10511) (fees for IRS letter rulings and opinion letters to be based on average time for and difficulty of complying with requests). Most recently the Court passed on the constitutionality of the pipeline safety user fees embodied in 49 U.S.C. app. § 1682a, which set forth a schedule of fees based on usage. *Skinner* v. *Mid-America Pipeline Co.*, 57 U.S.L.W. 4458 (April 25, 1989).

not vary with such use, it does not pass muster even under the decisions cited by the government.[33]

The problems with the fee here are no different than those identified by Judge Kozinski, and by choosing to seek legislation rather than appealing that determination, the government should be collaterally estopped from re-litigating the issue.[34] In noting the inadequate support for Treasury's revenue-based deductions initially, the Claims Court stated that it was

> not an exaggeration but a plain statement of fact, to say *there is zero, nothing in the record* to suggest any thought as to what the benefits were that were being conferred upon the people who are going to be charged the fee, *and no thought at all* in relating those benefits to the costs incurred by the government, and somehow coming up with a fee that reasonably attempted to match benefits and costs.

J.S. App. 40a (emphasis supplied).[35] The court also found that the revenue-related structure of the deductions pre-

[33] Fees based on the amount of the award are more like the illegal taxes in *Interstate Transit, Inc.* v. *Lindsey*, 283 U.S. 183, 190 (1931), which were based on earning capacity of a vehicle as oposed to its use of a state's highways. *See also Western Oil and Gas Ass'n* v. *Cory*, 726 F.2d 1340, 1343-45 (9th Cir. 1984), *aff'd*, 471 U.S. 81 (1985) (volumetric charges are not user fees because they are not reflective of benefits conferred); *Teleprompter Corp.* v. *City of New York*, 82 A.D.2d 145, 441 N.Y.S.2d 239 (1981) (payments for right-of-way based on percentage of gross receipts held to be a tax). *See also amicus* brief of Chevron Corp. at 22.

[34] *Montana* v. *United States*, 440 U.S. 147, 155 (1979); *Niagara Frontier Tariff Bureau, Inc.* v. *United States*, 826 F.2d 1186, 1190 (2d Cir. 1987).

[35] The Claims Court found it baffling that there were *no* affidavits, *nothing* to support the assumptions as to total awards, *nothing* to support the assumptions as to total costs: "Was it a guess? Was it a model? Was it a figure picked out of the air?" J.S. App. 38a. Nothing

cluded any notion that such deductions could be reasonably related to use, except by pure chance. J.S. App. 43a-44a. There is simply no reasonable relationship between a revenue related fee and the cost of the benefit conferred on the user of agency services. *Id.* "[W]here the persons who receive essentially the same physical services [e.g., a hearing] are charged a grossly variable fee solely for the reason that some are larger or have more income", the cost/benefit standard is not satisfied. *Capital Cities Communications, Inc.* v. *FCC*, 554 F.2d 1135, 1138 (D.C. Cir. 1976).

In the absence of any thoughtful approach to determine a reasonable fee beyond the simple conclusion that a lower percentage is "fairer", the proposed fee under the legislation is, like Treasury's two percent fee, *not* reasonably related to its stated express purpose of cost recovery. Indeed, Congress never analyzed the costs or benefits nor did it formally put forth anything to justify any level of fee. The government's curious reliance on cases construing the taxing power as excusing any cost/benefit relationship is itself a concession that the deductions are not user fees. Br. 26.[36] It is also interesting to note that the federal

further was offered in Congress to support any level of fees. The State Department only made some additional unsupported estimates of costs and U.S. contributions to the Tribunal in response to two of the additional questions submitted for the record at the hearings. J.A. 160. Notwithstanding the absence of a cost/benefit analysis, the government has repeatedly stated in its brief that the fees are "reasonable" and even cited its *own* testimony as evidence of what Congress "could" have determined. Br. 27, 45-46. Statements by interested parties in hearings, of course, are of no significance in determining what Congress actually did or did not do. *Kelly* v. *Robinson*, 479 U.S. 36, 50 n.13 (1986).

[36] The government fails to explain the basis for its assertion that taxing cases "are relevant in this setting," and provides no supporting authority. Moreover, in the only decision the government cites that even addresses both general taxing and user fee cases, the Court recognized that such decisions are not relevant to each other. *See Com-*

government itself has challenged "fees" that, when assessed on the federal government by a state, have not satisfied the cost/benefit relationship because the expense incurred has been in part for state agency services which benefit the public at large. *United States* v. *Maine*, 524 F. Supp. 1056, 1059 (D. Me. 1981).

Nonetheless, the government urges that because Sperry "benefitted" to some degree from the Tribunal and "voluntarily invoked" its jurisdiction, it may be charged. In the takings context, the extent to which a claimant is a beneficiary of governmental action is only relevant if the claimant was the particular *intended* beneficiary of the action. *See National Bd. of YMCA* v. *United States*, 395 U.S. 85, 92 (1969); *Belk* v. *United States*, 858 F.2d 706, 709 (Fed. Cir. 1988).[37] The intended beneficiary of the establishment of the Tribunal, the costs of which the government sought to recover, was the nation as a whole; it was established *only* as part of the resolution of the hostage crisis, and in response to Iran's stated conditions for the release of the hostages. The government's belief that it could have dissolved the attachments and not provided a forum for resolving and paying claims, Br. 39, is thus irrelevant; in any event that possibility does not allow the claims for compensation to be discounted. Once the government exercised its discretion to "protect" the property of commercial claimants, it could not then appropriate such

monwealth Edison Co. v. *Montana*, 453 U.S. 609, 621 (1981) (in reviewing challenge to a general revenue-raising tax, the Court "put to one side those cases in which the Court reviewed challenges to 'user' fees or 'taxes' that were designed and defended as a specific charge imposed by the [government] for the use of [government-provided] facilities and services.").

[37] In an exhaustive analysis of federal user fees, Professors Gillette and Hopkins noted that "[v]oluntariness . . . seems an *insufficient* justification for user fees." Gillette and Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U.L. Rev. 795, 831-32 (1987) (emphasis added).

property without paying compensation. "The Army could not . . . appropriate the YMCA today and claim that no payment was due because the building would have been completely demolished if the military had not intervened [initially]." *National Bd. of YMCA*, 395 U.S. at 96 (Harlan, J., concurring). *See also Dames & Moore*, 453 U.S. at 687-88; J.S. App. 11a. The government completely overlooks this basic principle in its apparent insistence that the Tribunal was gratuitously established for the claimants' benefit.[38] Sperry and other claimants by no means "voluntarily" invoked the Tribunal's procedures. The government made the Tribunal the *only* forum available to resolve commercial claims by eliminating the chosen and preferred forum, and therefore it cannot assert that proceeding at the Tribunal was by any means "voluntary". Unless a claimant wished to forfeit a claim entirely, a claimant had no choice but to proceed at the Tribunal, as prescribed by the Algiers Accords—a completely *in*voluntary act.[39] Because the government was constitutionally required to provide a substitute for the U.S. courts, it could not thereafter attempt to shift any of its added costs to those who were forced to proceed at the Tribunal. *Cf.*

[38] Not only did Sperry have ongoing litigation and substantial attachments *before* the suspension and referral of the claims to the Tribunal, Sperry and a multitude of others opposed the government's intervention. Indeed, Sperry had claims totalling $18 million, secured by attachments for $7 million, but later, after being forced to the Tribunal, agreed to settle with Iran for $2.8 million. Quite differently, the claims involved in prior international settlements were not commercial claims but arose out of expropriations. For example, in *Shanghai Power*, the claimant had absolutely no hope for any satisfaction of its claim growing out of the 1950 expropriation of its property and without the president's intervention may have continued indefinitely with no prospect for any recovery. J.S. App. 9a; 4 Cl. Ct. at 245.

[39] This factual setting also distinguishes the government's reliance on *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984) where the Court found no "taking" when a corporation voluntarily submitted itself to conditions statutorily authorized in advance. *Id.* at 1006-07.

United States v. *Kras*, 409 U.S. 434, 447 (1973) (contrasting legislative with constitutional "benefits"); *Kadrmas* v. *Dickinson Pub. Schools*, 108 S. Ct. 2481, 2488-89 (1988) (noting availability of alternatives to government provided services).

The government also implies that the provision of an alternate forum at The Hague allowed claimants such as Sperry to overcome jurisdictional obstacles to asserting claims against Iran in U.S. courts under the FSIA. Br. 35. As demonstrated by the overwhelming number of challenges to the establishment of the Tribunal brought by litigants who preferred the FSIA and U.S. courts, claimants such as Sperry did not "elect" to proceed at the Tribunal in the usual sense—they were given no other choice under the terms of the Algiers Accords. If the Tribunal were the only method of recovery, then the FSIA is of no statutory significance, foreign investments are subject to the whim of our government and the Court's opinion in Part V of *Dames & Moore* is without basis.

Nevertheless, the government contends that four jurisdictional obstacles were avoided by referring the claims to the Tribunal and that a claimant's likelihood of recovery was thereby actually "enhanced". Br. 35.[40] In questioning whether claimants would actually have had the opportunity to recover on their claims in U.S. courts, the government first asserts that "contacts" with Iran were insufficient to support jurisdiction. That jurisdictional argument, however, was rejected and judgment entered for the American claimants in *American International Group* v. *Iran*, 493

[40] Even this Court thought it could not be overly confident about that contention. *Dames & Moore*, 453 U.S. at 687. Indeed, submitting claims to the Tribunal, where one out of three judges is vehemently anti-American, has proven the "enhancement" envisioned by the government to have been at times quite illusory. *See amicus* brief of Chevron Corp. at 15-16.

F. Supp. 522, 526 (D.D.C. 1980), *remanded on other grounds*, 657 F.2d 230 (D.C. Cir. 1981).

Second, the government believes that the Act of State doctrine would have barred adjudication of the commercial claims. That doctrine is clearly inapplicable here, given the commercial basis of the underlying claims. *Alfred Dunhill, Inc.* v. *Cuba*, 425 U.S. 682, 697-98 (1976). *See also* H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 20, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6619 (citing United States *amicus* brief in *Dunhill* for the point that "to elevate the foreign state's commercial acts to the protected status of 'acts of state' would frustrate [the FSIA] by permitting sovereign immunity to reenter through the back door"). One court analyzing the act of state doctrine in terms of the Iranian claims agreed that it was not a bar to jurisdiction. *American Int'l Group*, 493 F. Supp. at 525.

Third, the provision in some of the contracts at issue requiring the resolution of disputes in "other forums" excluded disputes from the Tribunal as well, as conceded by the government. And when local remedies provided for in the contracts become essentially "ineffective or meaningless," as they did here, jurisdiction in U.S. courts would be proper. *Id.* at 525.

Finally, although there has been some dispute as to the availability of prejudgment attachments of Iranian assets here, a judgment in U.S. courts under the FSIA would have been enforceable in other jurisdictions where the Iranians maintain assets, and the assets here in the U.S. were not exempt from post-judgment execution. Treaty of Amity, August 15, 1955, United States-Iran, art. XI, § 4, 8 U.S.T. 899, T.I.A.S. No. 3853; Westin, *Enforcing Foreign Commercial Judgments and Arbitral Awards In The United States, West Germany and England*, 19 Law & Pol'y Int'l Bus. 325 (1987). While it would be difficult to compare directly the likelihood of recoveries in U.S. courts versus

the Tribunal, the fact that the government in establishing the Tribunal may have provided a forum where claimants *did* recover does not justify an effort thereafter to diminish the value of that recovery, even if there was a likelihood of "no recovery" without the Tribunal. *See National Bd. of YMCA*, 395 U.S. at 96 (Harlan, J, concurring).

If there was any intent at the time of the Accords to impose a tax or have the claimants bear the costs, then such an intent would have been expressed in the Accords, an Executive Order, or in enabling legislation at or near the time the Accords were negotiated or reviewed, and prior to the filing deadline at the Tribunal. However, the Accords made no mention of charges to fund the Tribunal's operation, and actually provided that the governments of both Iran and the United States bear the costs equally. J.A. 41. This was made clear in the Tribunal's modification to UNCITRAL Rule 38.[41] The Tribunal exempted its own fees and expenses from the costs which could be assessed against the parties: "The Full Tribunal shall fix the fees and expenses of the Tribunal which, in accordance with [the Algiers Accords], shall be borne equally by the two Governments." 2 U.S.C.T.R. 405, 438 (1983). Further, the Executive Order issued in February 1981 was embodied in a Treasury regulation that provided for *full* payment of awards, Mot. Dis. or Aff. App. 3a-4a, 31 C.F.R. § 535.222. Congress also directed the *State Department* to be responsible for funding the expenses of the Tribunal. Mot. Dis. or Aff. App. 7a. Finally, the usual practice is that the *losing* party, not the successful party, pay "costs", even under the original UNCITRAL Rule. It is thus simply illogical to conclude that successful claimants should have *expected* to be charged for the expenses of running the Tribunal.

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[41] The UNCITRAL Rules were to apply to the arbitration at the Tribunal unless so modified. J.A. 39.

As the court of appeals correctly noted, it is irrelevant that the Foreign Claims Settlement Commission (FCSC) assesses fees. J.S. App. 9a-10a. The FCSC was not part of the process of adjudicating claims of Sperry or any other large claimant and there was no reason to presume that its procedures or fees would apply.[42] If the fees were rational or expected and reasonable, why was nothing done early on to establish them? It was not until June 1982 on the day the first Tribunal award was to be paid that the government did anything to assess fees. At this point, Sperry, as well as other claimants, already had filed claims in the Tribunal as required by the Accords. The entire rationale for imposing the fees at that late date was *not* that claimants knew about the fees or should have expected them, but to avoid criticism. Mot. Dis. or Aff. App. 10a. Treasury's illegal attempt to impose the fees then cannot be grounds now to conclude that claimants should have expected legislation imposing the fees.

II. THE IRAN CLAIMS SETTLEMENT ACT IS VOID UNDER THE DUE PROCESS AND ORIGINATION CLAUSES AS WELL

A. The Retroactive Application Of the Iran Claims Settlement Act Renders It Unconstitutional Under The Due Process Clause

The deductions authorized by the Iran Claims Settlement Act apply to all awards of successful claimants before the Tribunal, both prior to and after the legislation was passed in 1985. Congress has often legislated with respect to past

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[42] The absence of the FCSC from the arbitral process suggests the absence of any such fees. The government nonetheless posits that although Sperry was not proceeding at the FCSC—and had no need for the FCSC—the routine deductions against lump-sum settlements negated any reasonable expectation to be exempt from deductions. Br. 42. However, there was no lump-sum settlement and, given the pending claims under the FSIA, the government could not settle the claims by lump-sum without running afoul of the Takings Clause. *See supra* at 23.

events and where Congress has explicitly manifested its intent to retroactively apply the legislation's terms, the analysis proceeds to whether the retroactive application of the statute is separately justified and constitutional. *See generally Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976). The manifest injustice in acceding to Congress's intent to apply retroactively legislation which authorizes prior taxes or administrative assessments—denominated "curative"—has depended almost exclusively on the nature of the conduct retroactively authorized and the legislative policy that preceded.[43]

The seminal decisions on the constitutionality of curative statutes are *United States* v. *Heinszen & Co.*, 206 U.S. 370 (1907) and *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338 (1922), neither of which is discussed by the government. Br. 43-45. In *Heinszen*, tariffs collected on goods imported into the Philippines had been held not to be authorized between 1899 and 1902, although they had been authorized expressly by legislation before and after those dates. Congress later enacted a statute that retroactively ratified the tariffs collected between 1899 and 1902. Finding the curative legislation valid, the Court held that Congress may " 'cure irregularities, and confirm proceedings which, without the confirmation, would be void, because unauthorized, provided such confirmation does not interfere with intervening rights.' " *Heinszen*, 206 U.S. at 384 (quoting *Mattingly* v. *District of Columbia*, 97 U.S. 687, 690 (1878)).

In *Forbes*, the Court restricted the retroactive application of a curative statute. At issue in *Forbes* was the collection of tolls by a state governmental agency under

[43] Hochman, *The Supreme Court And The Constitutionality Of Retroactive Legislation*, 73 Harv. L. Rev. 692, 703-04 (1960); Slawson, *Constitutional And Legislative Considerations In Retroactive Lawmaking*, 48 Calif. L. Rev. 216, 238 (1960).

a mistaken belief that it was authorized to collect them. The same day that the Florida Supreme Court held that the agency was not empowered to collect the tolls, the Florida legislature enacted a statute to authorize retroactively the collection of the tolls. The Court, distinguishing this situation from that in *Heinszen*, held that this retroactive legislation was unconstitutional:

> Stripped of conciliatory phrases the question is whether a state legislature can take away from a private party a right to recover money that is due when the act is passed. . . . [R]atification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act.

258 U.S. at 339 (citations omitted). Together, "*Heinszen* and *Forbes* appear to stand for the proposition that administrative, procedural, and technical defects *unrelated* to the underlying policy may be remedied by curative legislation, while legislative policy may not be changed retroactively." *Van Emmerik* v. *Janklow*, 454 U.S. 1131, 1133 (1982) (White and Blackmun, JJ., dissenting to dismissal for want of substantial federal question) (emphasis added).

Thus, consistent with *Heinszen* and *Forbes*, to qualify for constitutional approval as "curative" of some administrative mistake, there must have been an underlying legislative policy which at some point implicitly approved the result later achieved retroactively, or there must have been no contrary legislative policy in effect during the time period affected by the retroactivity. For example, situations where there was an unintended lapse in authority would qualify. However, prior unauthorized administrative action cannot serve to bootstrap new legislative policy into earlier existence.[44]

[44] Routinely allowing retroactive authorization of illegal conduct without regard to prior existing legislative policy would produce absurd

Under this analysis, the Iran Claims Settlement Act is unconstitutional retroactive legislation. The government asserts that the Act merely "cured" the "technical defects" in the previous administrative scheme declared void by the Claims Court. Br. 43. However, the defects identified by the Claims Court were substantive, not technical, and belie any notion that a scheme of revenue-related deductions could be considered "user fees". *Capital Cities Communications* v. *FCC*, 554 F.2d 1135, 1138 (D.C. Cir. 1976); Part IB, *supra*. Thus, prior to the Act there was no legislative policy that implicitly or explicitly approved the idea of claimants paying the costs of the Tribunal. Instead, the Algiers Accords provide that the respective governments, not the individual claimants, bear all the costs of the establishment and operation of the Tribunal. J.A. 41. The Senate also indicated its intent that the *government* assume the costs of providing personnel and resources for the Tribunal's effective operation. Mot. Dis. or Aff. App. 7a. The UNCITRAL rules provided that, unless agreed otherwise, the *losing* party was required to pay costs. The Tribunal then expressly modified the UNCITRAL rules to be consistent with the provision in the Accords that the respective *governments*, not the losing party, were to bear the expenses of the Tribunal. 2 U.S.C.T.R. 438. Indeed, there was *nothing* alluding to any possible deductions prior to the filing deadline at the Tribunal.

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results. "Are we really prepared to say that the State taxing authorities can collect an increased tax for 10, 20, 50 or 100 years without legislative sanction and then have it ratified by retroactive legislation? . . . This is not the democratic way and might well lead to another Boston Tea Party." *State ex rel. Van Emmerik* v. *Janklow*, 304 N.W.2d 700, 709 (S.D. 1981) (Dunn, J. dissenting), *appeal dismissed*, 454 U.S. 1131 (1982). *See also Washington Nat'l Arena Ltd. Partnership* v. *Treasurer, Prince George's County*, 287 Md. 38, 410 A.2d 1060, 1069, *cert. denied*, 449 U.S. 834 (1980) (retroactive increase in recordation tax rates unconstitutional based on *Forbes*).

The Claims Court also found *no* legislative support for Treasury's effort to collect fees by way of the Directive License. Indeed, the fact that the Treasury made deductions illegally, and that the basic structure of the deductions violated the IOAA, completely undercuts the government's contention that the fee "falls squarely within" the IOAA's policy. Br. 44. Because Congress never stated that it originally intended to give Treasury the authority to recover costs by percentage deductions from Tribunal awards, it was retroactively authorizing illegal deductions which were not merely technically flawed, but contrary to law and policy. This feature independently renders the Iran Claims Settlement Act unconstitutional.

B. By Unevenly Charging Those Who "Used" The Tribunal And Allowing Other Claimants Recovering On Claims Against Iran To Escape Deductions, The Iran Claims Settlement Act Denies Sperry Equal Protection Of The Law

The Iran Claims Settlement Act only charges claimants like Sperry, who were successful in recovering on their claims before the Tribunal, either at trial or in settlement negotiations, while not charging those who used the Tribunal but did not obtain an award. The Act also charges non-bank claimants receiving payments from the Security Account but does *not* charge bank claimants whose claims are satisfied by payments from a similar account (funded by the previously frozen assets) established at the Bank of England. *See* J.A. 26. This operation denied Sperry equal protection of the laws in violation of the Fifth Amendment.[45]

The first step in an equal protection analysis is to define properly the class of persons who can accomplish the purpose of the legislation at issue. If this legislation is applied

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[45] *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954) (equal protection of the laws guaranteed under the Fifth Amendment's Due Process Clause).

to a more limited class of persons than those who can accomplish its purpose, the court must demand a rational reason for burdening only a portion of the group. *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966). The court reviewing the legislation must not accept blindly the classification made by the legislation itself as a starting point for its inquiry. In *Williams* v. *Vermont*, 472 U.S. 14 (1985), the Court explained:

> A State cannot deflect an equal protection challenge by observing that in light of the statutory classification all those within the burdened class are similarly situated. *The classification must reflect pre-existing differences; it cannot create new ones that are supported by only their own bootstraps.*

Id. at 27 (emphasis supplied). The classification drawn by the Iran Claims Settlement Act does not "reflect pre-existing differences" among all persons using the resources of the Tribunal. A classification rationally related to the stated purpose of the legislation—cost recovery—and reflecting pre-existing differences, would necessarily be the entire class of claimants before the Tribunal and those obtaining payments from accounts funded by previously frozen assets.[46]

More is required of a law "than nondiscriminatory application within the class it establishes." 384 U.S. at 308. Although legislation may impose burdens upon certain

[46] In *Rinaldi*, the Court invalidated a state statutory scheme that reimbursed the costs of providing trial transcripts to indigent appellants by charging only certain of the appellants for the transcripts. Only those indigent appellants receiving a prison paycheck were burdened with reimbursing the county for the transcript costs. Those appellants who won their appeal, or who lost their appeal and were simply fined or put on probation, were not so burdened. The Court held that this treatment was unconstitutional because there was no rational purpose for the narrow classification defined by the statute. 384 U.S. at 309.

classes if permissible reasons exist, "the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.' " *Id.* at 309 (citation omitted).[47] Because the purpose for the legislation in *Rinaldi* was to reimburse the county for the costs of the transcripts provided to the indigent appellants, there was no relevance in singling out only those appellants who were unsuccessful in their appeal and incarcerated. *Id.*

Similarly, here, because the purpose of the statute authorizing the deductions is purportedly to help defray the costs of operating the Tribunal, there is no relevance in singling out only those claimants who, after using the resources of the Tribunal, happen to win. In *Rinaldi*, the proper classification for the legislation would have been all indigent appellants who received free transcripts—whether successful on appeal, unsuccessful, incarcerated or fined. Here, the proper classification should be all claimants who used the services of the Tribunal or received payments from accounts established with previously frozen assets—whether successful in trial, successful in a negotiated settlement like Sperry, or completely unsuccessful.

The only "reason" offered for the limited classification was that charging unsuccessful claimants more than a nominal fee might deter them from using the Tribunal. Br. 45.[48] The government, however, has not explained how

[47] Recognizing the pitfalls of reviewing legislation under an equal protection analysis, the Court in *Williams* noted that a rational basis scrutiny does not mean no scrutiny at all. Although the test allows for a broad source of "reasons" for legislation, it does not allow for a "casual" reason to justify a law that burdens a limited class of persons, "particularly when a more precise and direct classification is easily drawn." 472 U.S. at 23 n.8.

[48] The cited portion of the hearings relied on by the government to support this "reason" is simply the State Department's responses to

such a fee could deter use because claimants could only be unsuccessful *after* use of the Tribunal. Further, use of the Tribunal was mandated by the Algiers Accords and Executive Orders long before any scheme of deductions was ever conceived. Here, the proper classification would have included all claimants before the Tribunal in order to be consistent with the purpose of the legislation to help defray the costs of operating the Tribunal.

A distinct example of the discriminatory operation of the Act is that the bank claimants escaped deductions altogether. Their claims were not "suspended" but *paid in full*, and no deductions have been assessed against their payments from Dollar Account No. 2 at the Bank of England. Stewart and Sherman, *Developments at the Iran-United States Claims Tribunal: 1981-1983*, 24 Va. J. Int'l L. 1, 11 (1983). If Sperry benefitted from the establishment of the Security Account, the banks surely benefitted from the establishment of a separate account funded by the previously frozen assets to pay their claims. J.A. 26, 44. *No* justification for this discriminatory treatment has been offered.[49] Accordingly, application of the Act denied Sperry's right to equal protection of the laws.

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supplemental questions. The executive was not disinterested in the legislation's passage; it prompted the legislation and was at the time in litigation with Sperry over this issue. Its statements at the hearings should be discounted as self-serving and, in any event, are of absolutely no significance in determining Congressional reasoning. *Kelly*, 479 U.S. at 50 n.13. The government also adds a second justification that Congress "could" conclude that only those who received an award sufficiently benefitted from the overall program. Br. 46. We should not consider speculative findings in the abstract; casual justifications such as these are simply unavailing. *See supra* note 47.

[49] An explanation, however, has been attempted for this disparate treatment. The banks held the cash deposits and other liquid assets demanded in return for the hostages' release and the banks had the ability to hold up the return of the deposits even after the government had lifted the freeze. The banks were thus in a position to insure their claims were satisfied first. The banks also negotiated the provisional

C. The Iran Claims Settlement Act Raises Revenue But Was Initiated In The Senate In Violation Of The Origination Clause

The Origination Clause of the Constitution provides that all bills for raising revenue must originate in the House of Representatives. U.S. Const. art. I, § 7, cl. 1. The Iran Claims Settlement Act runs afoul of this constitutional requirement because the Act's only purpose is to "raise revenue" and it originated in the Senate, not the House.

If the purpose of an act is to raise revenue to be applied to meet the expenses of the government or otherwise create public funds for the service of the government, the legislation "raises revenue" within the meaning of the Origination Clause. *Millard* v. *Roberts*, 202 U.S. 429, 436-37 (1906); *United States* v. *Norton*, 91 U.S. 566, 569 (1876). The Act had no regulatory underpinnings, and did not establish the Tribunal or have anything to do with processing or paying claims there; its only purpose was to raise revenue. And, the revenue so raised was not related to any other provision in the Act. This conclusion is supported not only by the facts preceding its introduction, but the legislative history as well.

For example, Senator Evans, when introducing the legislation which would eventually become the Act, stated that the Bench Ruling in Sperry's favor was the critical reason for the legislation. Ct. App. J.A. 95. At the commencement of the hearings, Senator Evans again reminded the congressional leaders that "swift action" on the bill was necessary lest fees have to be "returned." Ct. App. J.A. 128. Further, the Foreign Relations Authorization Act (of which the Act here became a part) did not contain any revenue-raising provisions when it originated in the House. The section authorizing deductions originated in the Senate

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terms of the Accords whereas the non-bank claimants were not even consulted. *See generally* Brownstein, *supra* note 14 at 1069-73.

(S.1116) and did not amend any similar bill from the House.[50]

While the Senate may "propose and concur with amendments" to revenue bills which originate in the House of Representatives, it may not, by virtue of an amendment, originate a revenue raising measure. "It is conceded . . . that the Senate can not propose an amendment raising revenue to any bill coming from the House, but only to a bill raising revenue." 2 A. Hinds, *Precedents Of The House of Representatives Of The United States* § 1489 at 952 (1907)[hereinafter "Hinds"]. *Cf. Armstrong* v. *United States*, 759 F.2d 1378, 1381-82 (9th Cir. 1985) (once a revenue bill has been initiated in the House, the Senate is fully empowered to propose amendments).

The Foreign Relations Authorization Act contained no revenue raising provisions when it was passed by the House, and thus could not be amended to add a revenue raising provision. Although the Foreign Relations Authorization Act did affect the Treasury by providing for the expenditures of money, it was not a revenue-raising measure. "A bill creating an office and fixing the salary of the officer affects the treasury to the extent of such salary, but is not a bill for raising revenue." 2 Hinds at § 1489 at 952.

Nevertheless, the government relies on *Twin City National Bank* v. *Nebeker*, 167 U.S. 196 (1897), to conclude that because the Act "addresses several issues bearing on the adjudication of claims" at the Tribunal, the deductions are not designed merely to raise revenue and are thus

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[50] "The Senate amendment . . . also authorizes the Secretary of the Treasury to deduct a small fee from awards to large claimants of the tribunal. . . . The House bill contains no comparable provision. . . . The conference substitute is substantially the same as the Senate provision." Ct. App. J.A. 120. This brief involvement by the House at the conference does not make the Act any less a Senate-originated bill. *United States* v. *Munoz-Flores*, 863 F.2d 654, 661 (9th Cir. 1989).

consistent with the Origination Clause. Br. 48. In *Twin City*, the Court upheld an amendment by the Senate which added a taxing measure to a non-revenue raising bill only because the tax did not raise revenue to meet government expenses. As the Court explained in *Millard*, this is a limited holding:

> 'The tax [in *Twin City*] was a means for effectually accomplishing the great object of giving to the people a currency that would rest, primarily, upon the honor of the United States and be available in every part of the country. *There was no purpose, by the Act or by any of its provisions, to raise revenue to be applied in meeting the expenses or obligations of the government.*'

202 U.S. at 436-37 (quoting *Twin City National Bank*, 167 U.S. at 203) (emphasis supplied). Thus, the court concluded that the taxes imposed in *Millard* were "but means to the purposes provided by the act." *Id.* at 437.

In contrast, the deductions from Tribunal awards here are paid directly into the Treasury's "general fund miscellaneous receipts", Ct. App. J.A. 40, to "offset the deficit", Ct. App. J.A. 95, and have absolutely nothing to do with the "greater purpose" of the Foreign Relations Authorization Act or any other provision of the Iran Claims Settlement Act.[51] Moreover, nothing in the Act addresses issues concerning adjudication of claims; it merely provides a mechanism for deducting percentages of the Tribunal awards as they are received in New York. Thus, the pri-

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[51] If the deductions were meant to fund the expenses of the Tribunal, Congress would have directed that they be credited towards the appropriations for the operation of the Tribunal in the same manner as district court filing fees are deposited in a special account to offset funds appropriated for the operation of U.S. courts. 28 U.S.C. §§ 1914, 1931. "This lack of restriction suggests that the revenue raising aspect of the bill is not subsidiary to any enunciated function." *United States* v. *Munoz-Flores*, 863 F.2d at 658.

mary purpose of the Act is raising revenue, *not* regulation, and accordingly the deduction is simply a legislative exactment. *See Brock* v. *Washington Metro. Area Transit Auth.*, 796 F.2d 481, 488-89 (D.C. Cir. 1986). The deductions are therefore unconstitutional because of the Act's improper origination in the Senate.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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AMICUS CURIAE

BRIEF

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No. 88-952

In The

Supreme Court of the United States

October Term, 1988

UNITED STATES OF AMERICA,

Appellant,

v.

SPERRY CORPORATION AND
SPERRY WORLD TRADE, INC.,

Appellees.

On Appeal from the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 36, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of appellees, Sperry Corporation and Sperry World Trade, Inc. (Sperry). Written consent to the filing of this brief has been granted by counsel for all parties. The consent letters have been lodged with the Clerk of the Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

The primary question presented in this case is whether a particular act of Congress is unconstitutional on the ground that it effects a taking of private property without payment of just compensation. Amicus seeks here to augment the argument before the Court concerning this issue. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the takings issue presented. PLF has participated in numerous cases involving issues arising under the Takings Clause of the Fifth Amendment.

STATEMENT OF THE CASE

On November 4, 1979, Iranian nationals seized control of the American Embassy in Tehran and took American citizens as hostages. In response, on November 14, 1979, President Carter declared a national emergency and issued an executive order blocking the removal or transfer of all Iranian assets subject to the jurisdiction of the United States. Executive Order No. 12,170, 3 C.F.R. § 457

(1980). President Carter authorized the Secretary of the Treasury to promulgate regulations implementing the blocking order. *Id.*

The Treasury Department promptly issued a regulation providing that unless licensed or authorized by the Secretary any judicial process including attachment, judgment, or execution with respect to Iranian property is null and void. 31 C.F.R. § 535.203(e) (1980). Shortly thereafter, on November 26, 1979, President Carter granted a general license authorizing the maintenance by private parties of certain judicial proceedings against Iran. 31 C.F.R. § 535.504(a) (1980). The general authorization was clarified by further regulation to specifically include the imposition of prejudgment attachment on Iranian property within the United States. 31 C.F.R. § 535.418 (1980). The general authorization, however, did not allow the entry or enforcement of judgment. 31 C.F.R. § 535.504(a) (1980).

Pursuant to the general authorization to maintain private actions, Sperry filed suit against Iran in July of 1980. Sperry also obtained prejudgment attachment of approximately $7 million against Iranian assets held in the United States. *Sperry Corporation v. Islamic Republic of Iran*, No. 80-1614 (S.D.N.Y. Oct. 24, 1980), *as cited in Sperry Corporation v. United States*, 853 F.2d 904, 905 (Fed. Cir. 1988).

Sperry's action was one of a multitude of claims brought by United States citizens and companies against Iran. Federal District Court Judge Duffy described the situation.

> "The events in Iran and the Secretary's regulations opened the litigation floodgates; law suits poured into this and other circuits seeking monetary damages for alleged civil wrongs ranging from the nationalization of private property to the repudiation of executory contracts. By September of 1980, 96 civil actions were pending in this district alone. The damages claimed in these actions amounted to many billions of dollars." *Marschalk Company, Inc. v. Iran National Airlines Corp.*, 518 F. Supp. 69, 74 (1981).

See also Cutler, *Negotiating the Iranian Settlement*, 67 A.B.A. J. 996, 998 (1981) (most of the $12 billion of frozen Iranian assets was subject to bank setoffs for loan defaults, judicial attachment by American claimants, or pending litigation in foreign courts).

Sperry's claim and prejudgment attachment of Iranian assets, combined with hundreds of other such claims, was an important element in using the freeze on Iranian assets as a tool for negotiating the hostages' release. *Id.* Eventually, these negotiations resulted in an agreement popularly known as the Algiers Accords (Accords) and the hostages were finally released on January 20, 1981. *See Dames & Moore v. Regan*, 453 U.S. 654, 664 (1981). Part of the agreement stated that a purpose of the Accords was to terminate all litigation as between the government of each party and the nationals of the other and to resolve such claims through binding arbitration. *Id.* at 665; Joint Appendix (JA) at 30. The agreement obligated the United States to terminate all legal proceedings against Iran in United States courts and to nullify all attachments and judgments. *Id.* Pursuant to the agreement, the Iran-United States Claims Tribunal (Tribunal) was established as a substitute forum to hear claims against Iran by United States nationals. JA at 38. A series

of executive orders implemented the agreement. JA at 28; *see generally Dames & Moore*, 453 U.S. at 665-66.

Sperry's lawsuit against Iran and prejudgment attachment of Iranian assets was thus terminated and nullified. Sperry therefore filed its claim with the Tribunal and eventually settled the matter for $2.8 million. A percentage of the award, however, was deducted by the United States government as reimbursement to the government for costs purportedly incurred in connection with the Tribunal. *Sperry*, 853 F.2d at 905. Sperry challenged the deduction in the United States Claims Court on multiple grounds. The Claims Court found, among other things, that the Department of Treasury did not have authority to charge for services provided by other departments and that there was an absence of evidence to support the deduction as a reasonable attempt to match benefits and costs. *Id.* at 906.

In response to the Claims Court ruling, Congress enacted the Iran-Claims Settlement Act (Act) which retroactively authorized deductions from awards to reimburse the government for expenses incurred in connection with the arbitration of claims before the Tribunal. *See id.* at 906. The Claims Court then rejected Sperry's arguments that the Act effected a taking without just compensation, denied Sperry equal protection of the law and due process, and violated the Origination Clause of the Federal Constitution. *Sperry*, 853 F.2d at 906.

The Circuit Court reversed the Claims Court and held that the deduction from the award was an uncompensated taking in violation of the Fifth Amendment. *Id.* at 907-09. The court reasoned that substituting the

Tribunal claims procedure for Sperry's lawsuit and prejudgment attachments did not benefit Sperry in a manner sufficient to justify appropriation of Sperry's money. *Id.* at 908. The use of private claims as bargaining chips in the resolution of a national crisis, and then further requiring that Sperry and other claimants bear the expense of settling that crisis, was viewed as violative of the principle that the Takings Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 908 (*citing First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) *quoting Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

SUMMARY OF ARGUMENT

Amicus limits its brief to two arguments. First, amicus contends that the takings claim in this case should not be analyzed under the multifactor approach utilized when analyzing the impact of land use regulations on private property. The present case is not a "regulatory taking" case. Rather, it is a divestiture of title case involving a straightforward appropriation of private property (money). That appropriation is either a valid fee properly imposed to reimburse the government for expenses incurred for Sperry's benefit, or it is not. If it is not a valid fee under the applicable standards for imposing such a fee, the appropriation of Sperry's money must necessarily be an uncompensated taking. Contrary to the invitation in the government's brief, the Court should not

analyze this case under the factors applied in the regulatory takings cases since those factors have no relevance in determining whether or not the deduction from Sperry's award is a proper charge.

Amicus' second argument contends that even if the Tribunal can be said to benefit Sperry in a manner that may normally justify imposition of a fee for services, Sperry should nevertheless not be charged for the expense in operating the Tribunal. The private claims against Iran by United States nationals, secured by prejudgment attachments against Iranian assets, was a significant economic lever used by the United States to resolve the hostage crisis. A key element in securing the release of the hostages was the termination of these claims and nullification of the attachments so that Iranian assets could be transferred to Iran. Under these circumstances the expenses associated with implementing the Algiers Accords by establishing and operating the Tribunal should be borne by the nation as a whole. Shifting such a public burden solely to the private claimants should be recognized as a taking under the guiding principle of the Takings Clause established in *Armstrong* and repeatedly reaffirmed by this Court.

ARGUMENT

I

THE "REGULATORY TAKINGS" CASES ARE NOT APPLICABLE

The government suggests, with an apparent lack of conviction,[1] that the Court may analyze the takings claim asserted by Sperry using approaches generally applicable to "regulatory taking" cases. Appellant's Brief (AB) at 40. The Court should reject this suggestion.

Regulatory takings cases involve governmental regulation of the use of private property. Police power enactments such as zoning ordinances are typical. Of course, it is well settled that a taking may result from the regulation of the use of property. As stated by Justice Holmes in *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 415 (1922), "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

It is with respect to these regulatory types of takings claims that the Court has developed a complex and essentially *ad hoc* analysis for determining whether the regulation so impairs the use of property that it may be said to go too far and result in a taking. *See, e.g., Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978); *Kaiser Aetna v. United States*, 444 U.S. 164, 174-75

[1] The government's brief does not appear to urge the Court to apply the analyses usually employed in regulatory taking cases. Rather, the government seems to strain to characterize the deduction as part of a regulatory framework and then appears to discuss such matters only because the Court "might" choose to apply such factors. AB at 40.

(1979); *Agins v. City of Tiburon*, 447 U.S. 255, 260-62 (1980). Such a multifactor approach is a consequence of the difficulty of determining when an otherwise valid police power regulation crosses over the "too far" line and effects a taking of the regulated property.

The present case, however, is not a regulatory taking case. It is a divestiture of title case. The deduction from Sperry's settlement award does not restrict or regulate in any way Sperry's use of its property. The governmental action here simply appropriates money from Sperry and places it into government coffers. There is a complete confiscation of Sperry's property interest with no remaining right for Sperry to possess, use, or dispose of the money. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) *citing United States of America v. General Motors*, 323 U.S. 373, 378 (1945) (government destruction of property rights where owner loses rights to possess, use, and dispose of the property). Indeed, the divestiture is so complete that Sperry does not even have title to the money. Of course, the law is well settled that governmental acquisition of title effects a taking. *Chicago, Rock Island & Pacific Railway Company v. United States*, 284 U.S. 80, 96 (1931). Indeed, conveyance of title is the very purpose of an exercise of the eminent domain power in ordinary condemnation proceedings.

Where there is a complete confiscation of a property interest, this Court has already recognized that the analytical framework applicable to regulatory takings cases does not apply. As stated in *United States v. Security Industrial Bank*, 459 U.S. 70, 75 (1982): "Since the governmental action here would result in a complete destruction of the property right of the secured party, the case fits but

awkwardly into the analytical framework employed in *Penn Central Transportation Co. v. New York City* and *Pruneyard Shopping Center v. Robins* where governmental action affected some but not all of the 'bundle of rights' which constitute the 'property' in question." (Citations omitted.) Of course, here Sperry has lost all rights to the property taken.

Similarly, in *Federal Communications Commission v. Florida Power Corp.*, 480 U.S. 245 (1987), this Court reaffirmed that " 'the multifactor inquiry [is] generally applicable to *non*possessory governmental activity.' " *Id.* at 252 (quoting *Loretto*, 458 U.S. at 440) (emphasis added). Of course, the governmental action in the present case is possessory since the government has acquired possession and has indeed taken title to money that otherwise belongs to Sperry. Accordingly, the multifactor approach for regulatory taking cases has no application. This was also the conclusion of the Circuit Court below. *Sperry*, 853 F.2d at 907.

The Circuit Court correctly recognized that *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), further supports the conclusion that the regulatory takings analysis has no relevance to the facts of this case.

> "In applying the multifactor takings analysis, *Connolly v. Pension Benefit Guaranty Corp.* first looked to the nature of the governmental action and noted that the government did 'not physically invade or *permanently appropriate* any of the employer's assets for its own use.' (Emphasis added [by the Circuit Court]). If the Court had determined the government had permanently appropriated the *funds* in question, it would have been unnecessary to consider other factors." *Sperry*, 853 F.2d at 907 (emphasis in original; citation omitted).

Rather than employing the various factors utilized in regulatory takings cases, the takings issue presented here should be resolved by application of the analytical framework employed in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). That case involved the interest accrued on an interpleader fund deposited with the registry of a county court. Although a separate fee was charged for services rendered in receiving the fund into the registry, the county nevertheless also retained the interest earned on the fund. *Id.* at 160. The issue was whether the retention of the interest constituted a taking of private property.

In addressing this issue *Webb's Pharmacies* first observed that if a taking of the interest earnings occurred, "it was obviously uncompensated" within the meaning of the Fifth Amendment. *Id.* at 160. In addition, the fund itself "plainly was private property" and not public property. *Id.* Similarly, if the deduction from Sperry's award is a taking it is obviously uncompensated and the money due to Sperry is clearly private property. *See id.* at 161.

Webb's Pharmacies next addressed the interest issue and asked: "What would justify the county's retention of that interest?" *Id.* at 162.

The Court first analyzed whether the interest was justified as a fee for services. Similarly, in the present case the Court should first address this issue as applied to the deduction from Sperry's award. Although the deduction

was stated to be a fee for services rendered, Sperry contends that the deduction cannot be a valid user fee because the amount of the fee bears no relationship to Sperry's use of the Tribunal and there was no attempt by Congress to fairly approximate the costs of benefits supplied. *See* Sperry's Brief at Section I.B. Sperry also supports the decision of the Circuit Court below holding that the deduction, despite its reference as a user fee, could not be a valid user fee since the fee only applies to successful claimants, not on all who use the Tribunal. *Sperry*, 853 F.2d at 909, *citing cf. Massachusetts v. United States*, 435 U.S. 444, 468 (1978). Whether the deduction was a proper user fee under these standards is beyond the scope of this amicus brief, however, amicus agrees with the position taken by Sperry and the Circuit Court below that the deduction cannot be properly justified as a user fee.

If the Court determines that the deduction is not a properly enacted user fee, the deduction from Sperry's award must necessarily constitute a taking. In that event, *Webb's Pharmacies* distinguishes the government action from the regulatory takings cases involving restrictions on the use of private property and concludes that the forced contribution to governmental revenues results in a taking. *Webb's Pharmacies*, 449 U.S. at 161-64.

> "This Court has been permissive in upholding governmental action that may deny the property owner of some beneficial use of his property or that may restrict the owner's full exploitation of the property, if such public action is justified as promoting the general welfare.
>
> "Here, however, Seminole County has not merely 'adjust[ed] the benefits and burdens of economic life

> to promote the common good.' Rather, the exaction is a forced contribution to general governmental revenues and it is not reasonably related to the costs of using the courts." *Id.* at 163.

II

PLACING THE COST OF RESOLVING A NATIONAL CRISIS UPON A DISCRETE FEW EFFECTS A TAKING

In determining whether the deduction from Sperry's award is a valid user fee, the Court should first consider the overall context of the hostage crisis. Even if Sperry may be said to have benefited from the establishment or use of the Tribunal, the overriding consideration should be that *the resolution of the hostage crisis* was the primary goal of the United States in negotiating the Algiers Accords. The Accords established the means for obtaining the release of the hostages by the United States agreeing to terminate judicial proceedings against Iran in United States courts, nullifying all attachments and judgments, and providing for the resolution of these claims through the international Tribunal. This was a key ingredient to successfully securing the hostages' release. That Sperry may have incidentally benefited in some way from the establishment of the Tribunal does not alter the fact that resolving the hostage crisis was a national concern, the expense of which should be borne by the nation as a whole.

In *Armstrong v. United States* the Court established:

> "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government

> from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

The Court has reaffirmed this principle on many occasions. *Nollan v. California Coastal Commission*, 483 U.S. ___, 97 L. Ed. 2d 677, 688 n.4 (1987), *and cites therein*. Its application to the facts of this case leads to the conclusion that, in all fairness and justice, the expenses in resolving the hostage crisis should be borne by the public as a whole and not shifted to private claimants such as Sperry who, through no fault of their own, were caught in the middle of the United States' efforts to exert economic pressure on Iran in order to secure the release of the hostages.

In evaluating the fairness and justice of the deduction it must first be recognized that economic pressure was the key leverage used by the United States in negotiating the Iranian settlement. Cutler, 67 A.B.A. J. at 996. The freeze order on all Iranian assets within United States jurisdiction was quickly followed by executive authorization for private claimants to file claims against Iran and obtain prejudgment attachments. 31 C.F.R. § 535.504(a) (1980); 31 C.F.R. § 535.418 (1980). As President Carter had apparently hoped, these actions resulted in a deluge of secured claims which became an important factor in the negotiations. *See* Comment, *Dames & Moore v. Regan – Rights in Conflict: The Fifth Amendment Held Hostage*, 31 Am. U.L. Rev. 345, 349, 384 (1982); Cutler, 67 A.B.A. J. at 998; *Marschalk v. Iran National Airlines Corp.*, 518 F. Supp. at 74.

That the claims were a significant factor in the negotiations for the hostages' release is evident by the express provisions in the Algiers Accords. The general principles of the Accords call for "restor[ing] the financial position of Iran" and "ensur[ing] the mobility and free transfer of all Iranian assets" and further states that a purpose of the agreement was to "terminate all litigation" including nullification of all attachments and judgments. JA at 30 (Declaration of the Government of the Democratic and Popular Republic of Algeria). Moreover, the claims settlement agreement was one of the five principal documents consisting of the Algiers Accords. JA at 25; JA at 37-42.

With this basic background, it is clear that the termination of judicial proceedings in United States courts and the provision of a substitute international tribunal was intended primarily to benefit the nation as a whole by resolving the Iranian crisis and bringing the hostages home. The role of the private claimants was essentially as bargaining chips due to the increased economic pressure on Iran resulting from billions of dollars of secured claims in United States courts. Under these circumstances, justice and fairness certainly should place the cost of achieving these national objectives on the nation as a whole. "The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts." *Dames & Moore*, 453 U.S. at 691 (Powell, J., concurring). As Congress and this Court have recognized, "the establishment of the Tribunal is 'of vital importance to the United States.' " *Dames & Moore*, 453 U.S. at 688

(quoting S. Rep. No. 97-71 at 5 (1981)). Moreover, "the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and [Iran]." *Dames & Moore*, 453 U.S. at 688.

The reasoning of *Armstrong* should guide this Court's analysis for determining whether the direct costs incurred by the United States in implementing the Algiers Accords, and thereby resolving the hostage crisis, may, in justice and fairness, be imposed on the private claimants rather than borne by the nation as a whole. Amicus submits that the facts of this case clearly call for application of the *Armstrong* principle and a ruling that such shifting of public burdens by deducting a percentage from Sperry's award constitutes a taking. The conclusion by the Circuit Court should be upheld. "Whatever [the deduction] was thought to be, it was a taking of Sperry's money to help settle the national crisis, a burden the government must bear on behalf of all of us." *Sperry*, 853 F.2d at 909.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the decision of the Circuit Court should be affirmed.

DATED: June, 1989.

Respectfully submitted,

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BRIEF OF CHEVRON CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-952

UNITED STATES OF AMERICA,
Appellant,
v.
SPERRY CORPORATION and SPERRY WORLD TRADE, INC.,
Appellees.

On Appeal from the United States Court of Appeals for the Federal Circuit

BRIEF OF CHEVRON CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

INTEREST OF *AMICUS CURIAE*

Amicus Chevron Corporation ("Chevron") appears in order to present its views with respect to the unconstitutionality of deductions by the United States from awards of the Iran-United States Claims Tribunal ("Tribunal").[1] Chevron did not voluntarily use the Tribunal, had no notice when it filed in the Tribunal that deductions would be made from Tribunal awards, and paid fees that far exceeded any use it made of the Tribunal.

Companies now part of Chevron had three separate claims, exceeding $500 million, against NIOC, the Iranian government oil company.[2] NIOC, in turn, had a $100

[1] All parties have consented in writing to the filing of this brief and their consents have been filed with the Clerk.

[2] The claims of Iran Chevron Oil Company and Transocean Gulf Oil Company arose from a twenty-year contract signed in 1973 by

million claim against Chevron for oil delivered to a company later merged with Chevron.[3] Thus, at least $100 million of Chevron's claims could have been set off against the debt to NIOC. No attachment or litigation was necessary.

The Algiers Accords and implementing orders jeopardized Chevron's position. In the Accords, the United States agreed to "terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises . . . to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration" in the Tribunal.[4] Chevron was forced to act. If it did not file its claims in the Tribunal, it would lose them.[5]

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a consortium of multinational oil companies, the National Iranian Oil Company ("NIOC"), and the Government of Iran. Iran Chevron and Transocean Gulf each suffered damages when the contract was prematurely terminated in 1979. Chevron has since acquired Gulf Oil Corporation and as a result is the successor to the claims of Gulf and its subsidiaries, including Transocean Gulf Oil Company. The claim of Chevron Research Company arose from a separate contract with NIOC. The three companies are referred to collectively hereafter as "Chevron."

[3] The claim was for $101,926,132.75 and interest against a Gulf subsidiary. NIOC also asserted numerous other claims against Chevron; none had merit.

[4] Declaration of the Government of the Democratic and Popular Republic of Algeria ("General Declaration"), General Principles, para. B, J.A. at 30.

[5] By the terms of the Accords, all claims had to be filed by January 19, 1982, if they were to be litigated before the Tribunal. Claims Settlement Declaration, art. III, para. 4, J.A. at 40. Pursuant to the Accords, President Reagan issued Executive Order 12294, 3 C.F.R. 139 (1982), 50 U.S.C. § 1701 note (1982), "suspending" all claims against Iran unless filed with the Tribunal. Although the order purported to preserve claims for purposes of set off or counterclaim, both this provision and the "suspension" language were contradicted by the Accords themselves. Moreover, the U.S. Government had ceded to the Tribunal its authority to interpret the Accords in a conclusive fashion. The Tribunal was expressly authorized to issue binding awards interpreting the Accords, to be enforced by damages if necessary. General Declaration, para. 17, J.A. at 37. In these circumstances, no prudent claimant could rely on the Executive Order, which could in any event have been reversed on the same theory used to justify the lifting of hundreds of prejudgment attachments obtained in reliance on earlier Executive Orders. *See Dames & Moore v. Regan*, 453 U.S. 654 (1981).

Chevron filed its claims in November 1981. Seven months later, the Treasury Department attempted to make deductions from awards, but this administrative action was held invalid by the U.S. Claims Court.[6] In 1985, Congress enacted the legislation challenged here.[7] By that time, Iran had filed counterclaims against Chevron in the Tribunal and withdrawal had become impossible.

The Tribunal never held a hearing on any of Chevron's claims. Chevron and NIOC settled. But NIOC would not settle Chevron's principal claims unless Chevron agreed to pay NIOC's counterclaim for $100 million. Because this counterclaim was not within the Tribunal's jurisdiction, Chevron paid NIOC $175 million outside the Tribunal to satisfy the $100 million debt with interest. In turn, NIOC agreed to the entry of judgments against it in the Tribunal totalling $116.5 million.[8] In the end, then, Chevron made a net payment of more than $58

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[6] The deduction was declared invalid in an oral opinion on May 1, 1985. J.S. App. 26a. Before the Claims Court could enter a final opinion, however, it was overtaken by congressional action.

[7] Iran Claims Settlement Act, 50 U.S.C. § 1701 note (Supp. IV 1986), incorporated as §§ 501-505 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, 99 Stat. 405 (1985).

[8] Chevron Research Company received $1,501,862 as Tribunal Award No. 48-19-1, entered June 1, 1983. The agreement to pay NIOC $175 million played no part in this award. Iran Chevron Oil Company and Transocean Gulf Oil Company received $57,500,000 each as Tribunal Award Nos. 208-73-3 and 209-78-3, respectively, entered January 13, 1986.

million to NIOC. For this dubious benefit, the Government charged Chevron a total of $1.2 million.[9]

SUMMARY OF ARGUMENT

This case does not involve the regulation of relationships between private property owners, but the appropriation of private wealth for the Government's own use. The risk of such exactions was of particular concern to the framers of the Constitution. They therefore included two clauses imposing substantive limits on the Government's authority to appropriate private assets. First, the Origination Clause of Article I provides a structural safeguard against abuse of the taxing power, by requiring that all such legislation originate in the chamber of the legislature most responsive to the people. Second, the Just Compensation Clause of the Fifth Amendment assures that the Government will not, even with legislative assent, single out some individuals for revenue burdens that go beyond those imposed on the population at large.

In this case, the Government denies that a deduction from a Tribunal award is either a tax subject to the structural safeguard of the Origination Clause or a taking governed by the compensation requirement of the Fifth Amendment. Rather, the Government asserts that such a deduction constitutes a "user fee"—a concept not mentioned in the Constitution. Because this concept, left unbounded, threatens to undermine the Constitution's most basic protections for property, it must be defined with reference to the framers' intent.

Two fundamental characteristics distinguish a proper user fee from a taking or a tax. First, the service or

[9] Deductions against Chevron totaled $1,222,527.93. Chevron has filed in the U.S. Claims Court to recover this amount. *Iran Chevron Oil Company v. United States*, No. 132-89 C (filed May 15, 1989); *Chevron Research Company v. United States*, No. 134-89 C (filed May 15, 1989); *Transocean Chevron Company v. United States*, No. 135-89 C (filed May 15, 1989).

benefit for which a fee is charged must be voluntarily requested by the individual. *National Cable Television Association v. United States*, 415 U.S. 336, 340 (1974). This permits an inference that the individual is receiving a special benefit beyond those received by other taxpayers and has agreed to payment of the fee.

Second, the fee must be based upon the cost of the service rendered to the individual. *See Massachusetts v. United States*, 435 U.S. 444 (1978). This prevents the Government from creating lawful monopolies and then charging excessive prices to citizens who have no alternative but to purchase those services from the Government. Where the Government prices its services to raise general revenues, it must meet the requirements of the Origination Clause.

The deduction made by the Government in this case does not meet either of these requirements. The claimants did not voluntarily file in the Tribunal, but were forced to do so when the Government foreclosed all litigation in the U.S. courts and offered the Tribunal as the only substitute. As illustrated by the nationwide storm of litigation culminating in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), American claimants viewed U.S. courts, whatever their disadvantages, as preferable to a tribunal in which every third judge was an Iranian. The Iranian government apparently was of the same view, since it insisted on the termination of litigation in U.S. courts as a predicate for return of the hostages.

The payment of the fee was also involuntary in that it was imposed months *after* the deadline for filing with the Tribunal. By that time, the claimants were not free to withdraw from the Tribunal, nor could they obtain effective and complete relief without utilizing the Security Account.

The deductions also fail to meet the definition of a user fee because they were designed to raise revenues, not to recoup actual costs of use. The legislative history of

the Iran Claims Settlement Act indicates that its purpose was "to offset the deficit." 131 Cong. Rec. S6490 (daily ed. May 17, 1985) (statement of Senator Evans upon introduction). Moreover, the purported fees were not imposed "based upon some fair approximation of use." *Massachusetts v. United States*, 435 U.S. 444, 464 (1978). Fees were imposed only upon large, nonbank claimants who won, and the fees were not calibrated in any way other than by the size of the award. State courts have held that an exaction purportedly covering court costs but actually based upon the size of the matter in dispute should properly be viewed as a tax rather than a fee. Here, Chevron, which settled its claims without a hearing, is required to pay more in a purported user fee than the cost to the United States of maintaining the Security Account for an entire year. Under these circumstances, the exaction is not a proper user fee.

Because the deduction is not a user fee and is admittedly not a tax nor subjected to the structural safeguards that limit taxes, it is a taking without compensation in violation of the Fifth Amendment.

ARGUMENT

I. THE DEDUCTION FROM TRIBUNAL AWARDS IS A TAKING IN VIOLATION OF THE FIFTH AMENDMENT

The Government argues that confiscating a portion of each Tribunal award is not a taking under the Fifth Amendment. On its face, however, the deduction is a classic taking. The Government did not regulate the rights of one property owner vis-a-vis other private parties; instead, it took property awarded to successful claimants and placed it in Government coffers.[10] The

[10] For this reason the "regulatory takings" cases, half-heartedly invoked by the Government, are inapposite. Those cases deal with government regulations that leave property in the owner's hands but interfere with its use. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Here the Government has finally and completely taken $42,000 from Sperry and $1.2 million from Chevron, and it has not done so as part of a broader regulatory scheme; the Tribunal had been established for years before the deduction was enacted. *See* pp. 25-26, *infra*.

taking of money from private citizens violates the Fifth Amendment no less than the seizure of real property. If there were any doubt on this score, it was surely resolved in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). There the Court unanimously treated as a *per se* taking the state's appropriation of $100,000 that had accrued as interest on an interpleader fund. *See also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

To the framers of the Constitution, the right to hold property was a fundamental aspect of liberty.[11] Government existed "no less for protection of the property than of the persons of individuals." *The Federalist* No. 54, at 339 (J. Madison) (C. Rossiter ed. 1961). To provide this protection, the framers placed two key substantive limitations on the Government's ability to take property from its citizens.

First, they limited the taxing power, recognizing that "there is, perhaps, no legislative act in which greater

The implications of the Government's "regulatory taking" argument are dangerous indeed. This Court has approved regulatory measures which reduce property values to a fraction of their previous worth. If takings of money can be treated as regulatory takings, then the Government will have gained the power to take not just 1½ percent but up to 90 percent of a citizen's assets. *See, e.g., Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (Los Angeles ordinance banning brickmaking within city limits held not a taking although it reduced the value of one property from $800,000 to approximately $60,000).

[11] *See* J. Madison, *Property*, National Gazette, March 27, 1792, *reprinted in* 14 *The Papers of James Madison* 266 (1983); J. Madison, *Note to His Speech on the Right of Suffrage*, in 3 *The Records of the Federal Convention of 1787*, 450, 452 (M. Farrand ed. 1966) (arguing for the necessity of devising a legislative structure which protected both property rights and individual rights).

opportunity and temptation are given to a predominant party to trample on the rules of justice." *The Federalist* No. 10, at 80 (J. Madison) (C. Rossiter ed.). Because no democracy can function without broad authority to impose taxes, however, the limit was structural: all taxes must originate in the House of Representatives.[12] Article I, § 7, cl. 1. The Origination Clause embodies "the Framers' concern that persons elected directly by the people have initial responsibility over taxation." *Skinner v. Mid-America Pipeline Co.*, 57 U.S.L.W. 4458, 4461 (U.S. April 25, 1989).[13] By placing the power to originate tax measures in the most accountable house of Congress, the framers ensured that the populace could readily remove those responsible for unpopular taxes. As one member of the Convention bluntly put it, the Origination Clause "will oblige some member in [the] lower branch to move, [and] people can then mark him." [14]

Because it depends on a political body, the Origination Clause provides little protection for individuals who might be singled out for burdens beyond those imposed on the general public. The seizure of the property of an individual for public use might meet with legislative approval, but still be fundamentally unfair to the individual. A second limitation on the legislative power—the

[12] The framers' efforts to limit the federal taxing power appear throughout Article I. Section 2 requires that "direct Taxes shall be apportioned among the several States." Section 8 provides that "all Duties, Imposts and Excises shall be uniform throughout the United States."

[13] This concern has not ceased to have validity despite changes in the selection process for the Senate. Members of the House serve for only two years between elections and serve discrete constituencies. These features make them more responsive to their constituents and easier to replace in the event of dissatisfaction.

[14] 1 *The Records of the Federal Convention of 1787* 234 (M. Farrand ed. 1966) (Statement of Hugh Williamson, North Carolina delegation).

Just Compensation Clause—was intended to provide protection against this contingency.[15]

The compensation requirement means that "[p]roperty of individuals cannot be appropriated by the State under [the eminent domain] power for the mere purpose of adding to the revenues of the State." T.M. Cooley, *Constitutional Limitations* at 653 n.1 (5th ed. 1883). "Eminent domain differs from taxation in that, in the former case, the citizen is compelled to surrender to the public something beyond his due proportion for the public benefit." *Id.* at 693. The Just Compensation Clause puts the individual whose property has been taken on a par with the citizens at large.

In this case, the Government denies that its deduction of funds from successful claimants' awards was either a taking controlled by the Just Compensation Clause or a tax governed by the Origination Clause. The Government necessarily holds that the deduction is not a tax, because the measure did not originate in the House of Representatives.[16] Moreover, the deduction was not labeled as a tax, discussed as part of a taxing program, or reviewed by the Committee of the House with responsibility for raising revenues. Thus, this taking of property was not subjected to any of the political safeguards that come from characterization as a tax—whether re-

[15] *See The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 708-13 (1985); *cf.* J. Madison, *Property*, *supra*, at 267.

[16] Senator Evans introduced the Iran Claims Settlement Act on May 17, 1985. 131 Cong. Rec. S6489-90 (daily ed. May 17, 1985). The measure was later incorporated into the Foreign Relations Authorization Act for Fiscal Years 1986 and 1987, Pub. L. 99-93, 99 Stat. 405 (1985), as Title V, and now appears at 50 U.S.C. § 1701 note (Supp. IV 1986). At no time did the House version of the authorizing act contain a provision for deductions from Tribunal awards, Conf. Rep. on H.R. 2068, H. Rep. No. 240, 99th Cong., 1st Sess., at 83 (1985).

quired formally by the Constitution or informally by political realities.[17]

At the same time, the Government asserts that this deduction is not subject to the Just Compensation Clause because it is a "user fee." This method of separating individuals from their property is not discussed at all in the Constitution. In arguing for this new category of exaction, the Government seeks to raise its funds in a constitutional no-man's land—where neither the political safeguard of the Origination Clause nor the judicial safeguard of the Just Compensation Clause limits the Government's power over its citizens' assets.

If the concept of user fees is to achieve this remarkable constitutional status, its contours must be defined in a fashion that does not trench on the framers' safeguards. The proper scope of the concept is suggested by its rationale. First, if they are not to be treated as takings, user fees must be voluntary. As this Court has noted, "[a] fee . . . is incident to a voluntary act. . . ." *National Cable Television Association v. United States*, 415 U.S. 336, 340 (1974). Where a citizen requests a service from the Government, the Government, "presumably, bestows a benefit on the applicant, not shared by other members of society." *Id.* at 341. It is the concept of voluntariness that distinguishes user fees from taxes and involuntary takings.

Some proportionality between fee and cost is also necessary. Many services that the Government provides to its citizens are unique, often because the Government has conferred a legal monopoly upon itself. In such circumstances, the Government is in a position to charge far more for a service than it costs. No doubt some drivers would voluntarily pay $5,000 to obtain a driver's license, just as some litigants would voluntarily give up $100,000 in interest on an interpleader fund in order to obtain a court order distributing the principal. *Cf. Webb's Fabulous Pharmacies, supra.* But such exorbitant charges cannot properly be characterized as user fees. When the Government uses its regulatory powers to raise revenue in this fashion, it is engaged in taxing. To avoid the constitutional constraints that operate with respect to taxes and takings, the revenue from the fee must reasonably approximate the cost of the service the Government provides.

[17] The Government reasons that because wide latitude is given to Congress in assessing taxes, "*a fortiori*" there are similarly few restrictions on what fees may be charged in connection with specific programs. Brief for Appellant at 25-27. This reasoning disregards the constitutional safeguards that accompany the Government's power to raise revenue through taxes.

Thus, what this case demands—and what the Government fails to supply—is a precise, constitutionally-rooted definition of "user fee." Once that term has been properly defined in light of the constitutional scheme, it becomes apparent that the Government's action here is not a "user fee," but rather a taking in violation of the Fifth Amendment.

II. THE DEDUCTION IS NOT A USER FEE BECAUSE IT WAS NOT VOLUNTARILY PAID

A. A User Fee Must Be Voluntary

User fees are charges the Government imposes when individuals request special services. They are based on an element of exchange: the requestor pays a fee and the Government confers the benefit requested. It is their voluntary nature that takes them outside the scope of the Fifth Amendment. Additionally, the voluntariness associated with user fees makes them an equitable way to apportion society's resources. Those who want the services pay for their costs and do not create additional burdens for other members of the public.

The cases of this Court distinguishing user fees from taxes for statutory purposes have emphasized the voluntary nature of user fees. In *National Cable Television Association v. United States*, 415 U.S. 336, at 340

(1974), for example, the Court stated that fees are "incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station." *Cf. Federal Power Commission v. New England Power Co.*, 415 U.S. 345, at 349 (1974) (But if we are to construe the Act to cover only 'fees' and not 'taxes' . . . the 'fee' presupposes an application.")[18]

The Government itself relies heavily on the premise that claimants voluntarily chose to use the Tribunal, Brief for Appellant at 30-32, and seeks to distinguish the present case from *Loretto* and *Webb's Fabulous Pharmacies* on precisely this basis. But a footnote reveals that its position is in fact far more sweeping. Brief for Appellant at 32 n.22. In the footnote, the Government asserts that user fees need not be limited to "persons who voluntarily engaged" in an activity or received government services. The two cases cited in the footnote, however, do not demonstrate that user fees can be imposed in the absence of a voluntary request. In one, the Court expressly characterized the exaction as a tax, not a user

[18] The definition of user fee set forth by the Court in *National Cable* was not novel, but rather summarized concepts long used by state courts. For example, *Stewart v. Verde River Irrigation and Power District*, 49 Ariz. 531, 68 P.2d 329 (1937), addressed the distinction between fees and taxes as follows:

> The distinction between the two is very plain. A tax is imposed upon the party paying it by mandate of the public authorities, without his being consulted in regard to its necessity, or having any option as to its payment. The amount is not determined by any reference to the service which he receives from the government, but by his ability to pay, based on property or income. On the other hand, a fee is always voluntary, in the sense that the party who pays it originally has, of his own volition, asked a public officer to perform certain services for him, which presumably bestow upon him a benefit not shared by other members of society.

Stewart, 68 P.2d at 334-35.

fee.[19] In the second, the Court did not rule on the validity of the fees.[20]

The Government cannot make voluntariness both crucial to its argument and irrelevant. An intelligent, voluntary decision to request government services and to pay an associated fee is the feature that allows user fees to escape the restrictions of the Takings Clause.

B. The Claimants Did Not Voluntarily Pay the Fee

1. The Government contends that American plaintiffs voluntarily invoked the jurisdiction of the Iran-United States Claims Tribunal. The history of the Tribunal belies that assertion.

American plaintiffs submitted their claims to the Tribunal only after losing an intense and hard-fought series of cases that culminated in this Court granting certiorari before judgment, holding a special argument session, and

[19] *Londoner v. Denver*, 210 U.S. 373 (1908). "The plaintiffs in error began this proceeding in a state court of Colorado to relieve lands owned by them from an assessment of a *tax* for the cost of paving a street upon which the lands abutted." *Id.* at 374 (emphasis added). The Court invalidated the assessment on due process grounds, and the case therefore provides no support for the Government's contention that the assessment therein was a valid "user fee." Moreover, *Londoner* arose in the context of a *state* law, where the Origination Clause could not have been relevant even had the assessment been valid.

[20] In addition, *United States v. Mitchell*, 463 U.S. 206 (1983), concerned the unique trust relationship between the federal government and Native Americans; and the very purpose of a trust is to protect the beneficiaries from the consequences of voluntary decisions about the disposition of trust assets. *See* 463 U.S. at 227. Compensation is allowed to a trustee not because the beneficiaries have agreed to it, but because it is set by the courts under fiduciary principles or otherwise subject to close judicial scrutiny. A. Scott & W. Fratcher, 3A *The Law of Trusts* § 242 (4th ed. 1988). The Government's resort to a trust law example to make the case for involuntary user fees demonstrates that in the typical case—where the individual is presumed capable of deciding for herself—a user fee must be voluntarily incurred.

eight days later issuing an opinion that upheld the Government's action. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

The Government overplays its victory in *Dames & Moore*. There, the Government successfully argued that claimants could be deprived of their attachments and stripped of their right to proceed in U.S. courts. As a result, if U.S. claimants were to preserve their claims at all, they had to file before the Tribunal. This is not a voluntary choice. "The thief who says, 'your money or your life' has given his victim a choice, but he cannot keep the money on the grounds that the victim gave it to him. The thief's threat of force transforms giving into taking." R. Epstein, *Takings: Private Property and the Power of Eminent Domain* at 99 (1985). Even if the Government's substitution of the Tribunal for the federal courts was not an unconstitutional taking, what the Government offered the claimants was not a choice, but a substitute.

Elsewhere, the Government shifts ground, suggesting that American claimants *should* have preferred the Tribunal because many of them would have faced obstacles in U.S. courts—Act of State doctrine, sovereign immunity, and the like—that they would not encounter in the Tribunal. Brief for Appellant at 34-36. In so arguing, the Government is not just second-guessing American claimants. It is second-guessing the Government of Iran, which made termination of the U.S. court proceedings a central demand in the hostage negotiations but which readily accepted the Tribunal as a substitute.[21] Whatever disadvantages claimants might have feared from the Act of State doctrine and the other factors listed by the

[21] *See The Iran Agreements: Hearings Before the Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess. at 20-23 (February 17, 18 and March 4, 1981) (summary of hostage crisis and negotiations accompanying statement of former Secretary of State Edmund Muskie); *see also id.* at 31 (statement of former Deputy Secretary of State Warren Christopher).

Government, both American claimants and Iranian defendants expected even more profound obstacles for Americans appearing before a Tribunal in which every third judge was an Iranian.

These expectations have been confirmed by events. Iranian judges have breached the confidentiality of Tribunal deliberations, telling Iranian defendants to submit new evidence after the hearing in the hopes of influencing the decision. *See Ultrasystems Inc. v. Iran*, Tribunal Award No. 27-84-3, 2 Iran-U.S. C.T.R. 114, 121 (1983) (Mosk, J., concurring) ("[T]elexes were admittedly submitted in connection with the deliberations in response to a unilateral, *ex parte* communication by one of the Arbitrators."). Iranian judges have apparently revealed the amount of forthcoming awards to defendants so they could quickly negotiate settlements at a lower figure.[22] And two Iranian judges physically attacked a third-country judge whose awards were viewed as too favorable to American claimants. John Crook, the Agent who represented the United States before the Tribunal, described the attack on the 69-year-old Judge Mangard in stark terms:

> Witnesses reported that Mr. Kashani and Mr. Shafeiei [the two Iranian judges] appeared to be waiting for Mr. Mangard as he descended the Tribunal stairs on his way to the scheduled meeting. When he walked within their reach, they began to yell at him, grabbed him, and began to force him towards the Tribunal's main door. Mr. Mangard was shoved down the hall almost to the Tribunal's door. Mr. Kashani held Mr. Mangard at the throat by the necktie and was twisting the necktie and shaking his victim. The attackers were continuing to shove Mr. Mangard toward the door. The U.S. Agent joined others who were trying to release Mr. Kashani's grip from Mr.

[22] *See* Baker & Davis, *Establishment of an Arbitral Tribunal Under the UNCITRAL Rules: The Experience of the Iran-United States Claims Tribunal*, 23 Int. Law. 81, 111-12 (1989).

Mangard's neck. According to observers, Mr. Shafeiei was beating Mr. Mangard on the back with his fists.[23]

The attack on Judge Mangard highlights the critical role of the third-country arbitrators at the Tribunal. The Tribunal's structure virtually guarantees that the deciding vote in every case will be cast by these arbitrators, all of whom are from civil-law countries. Even if these judges can remain uninfluenced by the tactics of the Iranian judges, they necessarily evaluate claims on the basis of legal and evidentiary standards quite foreign to American claimants. In fact, third-country judges cannot humanly be expected to ignore the tactics of the Iranian panel members. The temptation to compromise with even the most unreasonable Iranian position is unavoidable.[24]

In short, the speculative advantages that the Government attributes to the Tribunal are counterbalanced by real and immediate disadvantages. But the point is not whether claimants would have been wise to choose the Tribunal instead of the courts. The point is that they did not have that choice. Their "use" was entirely involuntary.

2. So was their payment of the fee. Neither Sperry nor Chevron nor any of the other claimants could possibly have voluntarily agreed to pay the fee for the simple reason that it was not imposed until months after the filing deadline for the Tribunal had passed.

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[23] Memorandum to Chief Justice Moons from John R. Crook (Sept. 17, 1984), I.A.L.R. 9,344-45 (Sept. 28, 1984). *See generally* Baker & Davis, *supra*, at 110-114 (describing hostilities within Tribunal and collecting newspaper accounts).

[24] The attack on Judge Mangard provides a telling example. Another third-country judge, Gunnar Lagergren, was President of the Tribunal at the time. He responded to the Iranian judges' attack by excluding Judge Mangard from the premises and shutting down the Tribunal while allowing the Iranian attackers to remain in their Tribunal offices for weeks issuing death threats to prevent Judge Mangard's return. *See* Baker & Davis, *supra*, at 113-14.

When they filed, there was no reason to expect such a fee. The Algiers Accords provide that arbitration before the Tribunal is to proceed under the UNCITRAL Arbitration Rules. Claims Settlement Declaration, art. III, para. 2, J.A. at 39. These rules, as is typical in arbitration, provide that "the costs of arbitration shall in principle be borne by the unsuccessful party." [25] To the extent that the Accords alter the rules, they require that the governments, rather than the winning party, pay Tribunal costs. Claims Settlement Declaration, art. VI, para. 3, J.A. at 41. Thus, any allegation of voluntariness is, in the unique circumstances of this controversy, vitiated by the Government's failure to provide notice that a deduction from awards would be made.

This Court has required notice sufficient to allow parties to modify their behavior when the result of an action by the Government will be to deprive an individual of property. *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983); *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). While there may be limited room for retroactivity with respect to taxes, *United States v. Darusmont*, 449 U.S. 292, 299 (1981); *Welch v. Henry*, 305 U.S. 134, 147 (1938), adequate notice is essential if user fees are to be excepted from the Takings Clause on the ground that they are voluntarily paid.[26]

For example, *New England Power Company v. United States Nuclear Regulatory Commission*, 683 F.2d 12 (1st Cir. 1982), addressed the Nuclear Regulatory Commission's attempts to impose retroactive user fees for license

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[25] UNCITRAL Arbitration Rules, Art. 40, para. 1, 7 Y.B. UNCITRAL (part 1) at 27 (1976), U.N. Doc. A/31/17 (1976).

[26] Limited retroactivity has been allowed with respect to some types of taxes because "[t]axation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract." *Welch v. Henry*, *supra*, at 146. Retroactive taxes dependent upon a voluntary act, however, have been held unconstitutional. *Id.* at 147. Of course, the analogy between taxes and user fees is a tenuous one, since taxes are subject to the additional protection of the Origination Clause.

applications. The court stressed the necessity that "such fees be communicated in advance to those who would have to bear them, thus permitting them to take intelligent action to avoid undesired consequences." *Id.* at 16 . Advance notice protected "the interest of the petitioners in knowing their financial exposure so that they could minimize it." *Id.* at 18. The court also noted that retroactive fees were "destructive of petitioners' justifiable reliance on the regulations as they previously read." *Id.* at 15 n.4. While the Court in *New England Power* did not find it necessary to reach a constitutional question, its reasoning is directly relevant here: citizens cannot take "intelligent action" to accept or avoid fees that are not "communicated in advance." When the amount of the fee—or even the *fact* that a fee will be charged—has not been communicated, the Government is simply taking property from unknowing citizens.

Here, the claimants had no indication that the Government intended to charge for use of the Tribunal at any time when they might arguably have altered their conduct to avoid the charge. The Government did not propose deductions from awards until June 7, 1982, five months after the filing deadline for claims. By then, claimants had submitted to the Tribunal's jurisdiction, and they were not free to withdraw at will. Once filed, the claims took on a life of their own. They could not be withdrawn without Tribunal permission. The Tribunal gave Iran an opportunity to object, and even if the Tribunal allowed withdrawal of American claims against Iran, it retained jurisdiction over Iranian counterclaims.[27] Moreover, had claimants withdrawn, the absence of any other forum would have effectively extinguished their claims. *See* note 5, *supra.* Because the claimants made

[27] *Behring International Inc. v. Islamic Republic of Iran Air Force,* Tribunal Case No. 302 (Order of Jan. 29, 1987), *reprinted in* 14 Iran-U.S. C.T.R. 23. *See also* Selby & Stewart, *Practical Aspects of Arbitrating Claims Before the Iran-United States Claims Tribunal,* 18 Int. Law. 211, 239 (1984).

the irrevocable decision to file without notice that a fee would be charged, the voluntary choice alleged by the Government was simply illusory.

3. The Government next asserts that claimants such as Sperry had a choice not to use the Security Account because they could have made other arrangements for payment of their awards. Sperry, for example, "could have declined to submit the settlement to the Tribunal and sought a greater amount from Iran." Brief for Appellant at 32 n.21. This argument should be rejected for two reasons.

First, it contradicts the Government's presentation to this Court in *Dames & Moore v. Regan,* 453 U.S. 654, at 686-87 (1981). There, the Government argued that no taking had occurred because "complete relief" was available from the Tribunal. "[T]he same claims that are pending in United States Courts will be heard in a different forum—the Claims Tribunal—capable of granting complete relief." Brief for Federal Respondents at 18, *Dames & Moore.* The Government stated and restated this theme: "the mere substitution of one competent forum for another to hear the same underlying claims and to award complete relief if the claim is found to be meritorious cannot be thought to constitute a taking of property in violation of the Fifth Amendment." *Id.* at 66.

Now the Government seeks to pare away the "complete relief" it offered in 1981. The Security Account was an important constituent of what was offered. If claimants who want complete relief can get it only by avoiding the Tribunal's payment mechanism and seeking some other way to enforce Iranian obligations, little is left of what the Government claimed to provide in *Dames & Moore.*

Second, the Government's claim that the claimants could bypass the Security Account through negotiations ignores the reality of the situation. Once a claimant had filed with the Tribunal, any award would be paid out of

the Security Account unless Iran agreed to the contrary. But Iran had a strong interest in making all payments from the Security Account. A total of $1 billion in Iranian government funds had been deposited in the Security Account; the interest it earned was also unavailable to the Iranian government except to replenish the Security Account.[28] Iran was only obliged to maintain the Security Account at a level of $500 million. General Declaration, para. 7, J.A. at 33. As long as there was more than $500 million in the Security and interest accounts combined, Iranian entities had absolutely no incentive to use money from other sources to pay awards when they could use funds that were otherwise useless to them. Thus, as a practical matter claimants could seldom expect Iranian entities to waive their right to pay claimants through the Security Account.

4. Finally, the Government's wide-ranging hunt for a voluntary act that justifies the deduction leads it to assert that American claimants "elected to engage in foreign commerce by entering into trade with Iran, a foreign sovereign." Brief for Appellant at 23. In the Government's view, these companies were necessarily aware that "any ensuing disputes might be affected by events beyond their control" and that the President might choose to settle their claims, making it "entirely appropriate" for Congress to charge them with the costs of the settlement effort. *Id.*

The Government's discussion is most notable for its lack of case law support. The Government cites only one decision, the *Head Money Cases*, 112 U.S. 580 (1884), which the Government argues grants it the authority to charge a user fee because the fee is "necessary and proper" to the exercise of other enumerated powers.

This argument answers the wrong question. Obviously, the imposition of user fees is constitutional only if it is

[28] Case A/1, Tribunal Decision No. DEC 12-A1-FT (Aug. 3, 1982), *reprinted in* 1 Iran-U.S. C.T.R. 189, 191-92.

"necessary and proper" to the exercise of some other enumerated power. But that relationship alone clearly does not validate a user fee any more than it could legitimize an uncompensated taking of property.

The proper question is whether Americans who did business with Iran thereby agreed that the U.S. Government could not only terminate their rights to go to court but could also charge them as much as $1.2 million for an alternate forum. In answer, the Government tries to treat those who trade abroad on a par with those who produce nuclear energy, transport hazardous substances by pipeline and engage in other activities subject to pervasive federal regulation and strict licensing requirements.[29] But international trade is not regulated in this fashion, and the notion that there is something unusual in American companies trading abroad hardly comports with today's commercial realities.

Nor did trade with Iran create the need for a fee "to defray the government's costs of regulating the activity or societal costs generated by it," as the Government suggests. Brief for Appellant at 22. The claimants were prepared to proceed in U.S. courts in the same way as every other member of society. Any additional costs were generated by the Government's resolution of the hostage crisis, not by the claimants' activities.

Moreover, the claimants now find themselves bearing special costs imposed on them by the Government. Tribunal hearings require that witnesses, parties, and lawyers travel to The Hague to present their evidence. Every filing before the Tribunal must be translated into Persian at a cost of $50 to $100 a page. The question of who imposed special costs on whom is not one the Government can afford to answer.

[29] *Cf. Skinner v. Mid-America Pipeline Co., supra*; *Mississippi Power & Light Co. v. U.S. Nuclear Regulatory Comm'n*, 601 F.2d 223, 229 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980) (upholding fees because "[a] license from the NRC is an absolute prerequisite to operating a nuclear facility").

In sum, the claimants did not request substitution of the Tribunal for the federal courts and were not given notice prior to filing that a fee would be charged. In the absence of a voluntary decision, the deductions were not legitimate user fees.

III. THE DEDUCTION IS NOT A USER FEE BECAUSE IT DOES NOT BEAR THE NECESSARY RELATIONSHIP TO COSTS IMPOSED BY CLAIMANTS

A. A User Fee May Charge Only for Costs Related to Use by an Individual

Voluntariness is not the only element of a user fee. If it were, the Government could avoid the Constitution's constraints by imposing exorbitant "fees" for articles used or activities performed voluntarily by the public in everyday life, such as drivers' licenses or entry onto city streets. To avoid such abuses, user fees are additionally circumscribed by the requirement that the amount charged by the Government bear a reasonable relationship to the cost of the service provided. If a user fee does more than reimburse the Government for the cost of providing benefits to individual recipients, it raises general revenue and becomes a tax rather than a user fee.

This Court has recognized in a statutory context that relationship to cost is a critical distinction between user fees and taxes. Thus, in *National Cable*, 415 U.S. at 340, the Court stated that when Congress imposes taxes, as opposed to fees, it "may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income." On the basis of this difference, the Court overturned an FCC fee schedule that would have allowed recoupment of the entire cost of the FCC's CATV oversight function.

Again, in *Massachusetts v. United States*, 435 U.S. 444 (1978), the Court distinguished between a user fee and a tax on the basis of relationship to the cost of use. Approving application of a registration tax to state-owned aircraft, the Court noted that "[a] user-fee ra-

tionale may be invoked whenever the United States is recovering a fair approxiination of the cost of benefits supplied." *Id.* at 463 n.19. The Court noted that user fees must be "based upon some fair approximation of use" and must not be "excessive in relation to the cost to the government of the benefits conferred." *Id.* at 464. *See also Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972).[30]

Lower courts have also routinely recognized the need for a relationship between user fees and costs. Judge Starr has noted that "the requirement that fees be tied to specific benefits is a requirement of fee statutes generally . . . I am aware of no case (and we are cited to none) interpreting a fee statute in which the requirement of a nexus between costs and benefits has not been im-

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[30] The Government cites other cases in which this Court has dealt with the definition of taxes, *see* Brief for Appellant at 47 n.29, but these demonstrate the recurring nature of both voluntariness and a fair approximation of use as critical elements in distinguishing taxes from user fees. In the *Head Money Cases*, 112 U.S. 580 (1884), the fees were charged incident to the shipowner's voluntary decision to transport immigrants into this country's ports and were designed to reimburse the government for costs incurred as a result. Because the fees were charged upon the number of immigrants transported by an individual ship, they were clearly related to the costs imposed by the use.

In *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935), and *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U.S. 455 (1886), charges were imposed only on those who chose to use the waterways in question. In *Clyde Mallory Lines*, where supervision of ships within the harbor by the harbor master protected against risks common to all, a flat fee was charged, just as individuals might pay a fixed premium for insurance. In *Morgan's Steamship Co.*, the charge for quarantine inspections was based on the type of vessel and thereby the effort which the quarantine inspector would expend in canvassing the vessel's contents. All of the charges were used either to pay the inspector or to constitute a fund wholly devoted to quarantine expenses and "no part of it ever [went] to defray the expenses of the State or city government." 118 U.S. at 461.

posed." [31] *See also Yosemite Park and Curry Co. v. United States*, 686 F.2d 925, 932 (Ct. Clms. 1982) ("[I]t is an imposition in the nature of a tax when Congress creates the need for a license and then charges more to obtain the license than it costs the Government to issue it.").

This Court's Origination Clause jurisprudence sounds similar themes. The principal cases relied upon by the Government, all decided before World War I, do not use the phrase "user fee," but the measures they exempt from the Origination Clause illustrate the importance of both voluntariness and relationship to cost. *United States v. Norton*, 91 U.S. 566 (1875), declared that a bill creating a postal money order system was not a revenue measure subject to the Origination Clause, even though the charges for money orders produced substantial sums. Such charges were not to be subject to the Origination Clause because they were incurred voluntarily in arm's-length exchanges and were not designed to make a profit for the Government. *Id.* at 568.

Similarly, *Twin City Bank v. Nebeker*, 167 U.S. 196 (1897), upheld charges imposed on banks that made deposits with the U.S. Treasury. These charges too were user fees. They were imposed only on associations that voluntarily incorporated as national banks and undertook to circulate notes, and the charges were apparently lim-

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[31] *Florida Power & Light Co. v. United States*, 846 F.2d 765, 779 n.7 (D.C. Cir. 1988), *cert. denied*, 57 U.S.L.W. 3722 (U.S. May 1, 1989) (Starr, J., dissenting).

When the Government sells a service or commodity as a market participant, the price may not be based upon the Government's costs, but market competition provides a strong constraint against excessive charges. As one court explained, "as a property owner [the Government] may charge fees for the use of its property. . . . These fees are paid *by choice and in exchange for a particular benefit*, the use of specific Government property, just as rents are freely paid for the use of private property." *City of Vanceburg v. Federal Energy Regulatory Commission*, 571 F.2d 630, 644 n.48 (D.C. Cir. 1977), *cert. denied*, 439 U.S. 818 (1978).

ited to covering "the expenses necessarily incurred" in managing the bank note system. *Id.* at 198-99.[32]

This Court's cases have generally identified bills that are subject to the Origination Clause by distinguishing between bills that "are made for the direct and avowed purpose of creating revenue" [33] and those "for other purposes which may incidentally create revenue." *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897). The Iran Claims Settlement Act fails even the broadest reading of this test. First, the Act was forthrightly presented as a measure to increase revenue. Its sponsor, Senator Evans, stated that the purpose of the Act was to "ensure that the bulk of the amounts recovered to date, over $6 million, would remain in the Treasury. Further, it would guarantee that an additional $12 to $20 million in revenues . . . would go into the Treasury *to offset the deficit*." 131 Cong. Rec. S6490 (daily ed. May 17, 1985)

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[32] *Millard v. Roberts*, 202 U.S. 429 (1906), upheld three statutes allowing payments to certain railroads for the purpose of eliminating grade crossings and building a railroad station in the District of Columbia, payments that would be recouped by means of a levy on property in the District. Again, the levies were to be matched precisely to the costs and benefits conferred on the District of Columbia.

A serious question can be raised about whether the case should have been analyzed under the Origination Clause at all. The statutes did not actually impose a tax but simply authorized the expenditures. As the court below pointed out, such authorizations or appropriations of funds did not implicate the Origination Clause. *Millard v. Roberts*, 25 App. D.C. 221, 223-24 (1905). More importantly, a requirement that the legislation originate in the House of Representatives would have been pointless, since the District of Columbia did not have representatives in that body. In the final analysis, the legislation in *Millard* was more akin to a local assessment on citizens adjacent to an improvement than to a national revenue-raising measure.

[33] *United States v. Norton*, 91 U.S. 566, 569 (1875) (*quoting United States v. Mayo*, 1 Gall. 396, 26 F. Cas. 1230, 1231 (C.C.D. Mass. 1813) (Story, J.) (No. 15,755).

(statement of Sen. Evans introducing Iran Claims Settlement Act) (emphasis added).[34]

Second, the Iran Claims Settlement Act did not create a general regulatory scheme to which the revenue measure is incidental. Of the Act's five sections, only two (§§ 501 and 503) arguably create a scheme regulating the resolution of claims or "prescribing the manner in which those claims may be presented, resolved, and paid." [35] But these sections deal with administration of a possible lump-sum settlement of small claims against Iran and have never been implemented; the deduction would not have applied to that arrangement. In fact, the provision imposing the deduction is entirely unrelated to resolving claims and stands alone as an attempt to raise revenue. *Compare South Carolina ex. rel. Tindal v. Block*, 717 F.2d 874, 887 (4th Cir. 1983), *cert. denied*, 465 U.S. 1080 (1984) (deduction upheld as regulatory measure designed to discourage milk production).

The Government's effort to tie the Act to the Algiers Accords also fails. Even if the Accords and implementing measures could be analogized to economic and safety regulations, the entire scheme was in place and functioning years before the Act was passed, and the Act did little or nothing to affect the substance of that scheme. This was a revenue—not a regulatory—measure.

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[34] *Cf. United States v. Munoz-Flores*, 863 F.2d 654 (9th Cir. 1988), where the court held violative of the Origination Clause two $25 "special assessments" for violation of the immigration laws. The court concluded, based on a review of the legislative history, that the purpose of the act was to raise revenue and that it therefore should have originated in the House.

[35] *See* Brief for Appellant at 40. Two other sections (§§ 504 and 505 respectively) authorize the Secretary of the Treasury to reimburse the Federal Reserve Bank of New York for Tribunal-related costs and deal with the public availability of documents related to proceedings before the Tribunal.

B. The Deductions from Tribunal Awards Were Not Related to the Cost of Use of the Tribunal

The deductions also cannot be justified as user fees because they did not reasonably approximate the cost of services provided to individual litigants. The Tribunal exists to hear many classes of cases, including (1) difficult and heavily freighted cases charging that one country or the other has violated the Accords, (2) claims by one government against the other, and (3) a variety of private claims. Virtually all of the Government's administrative costs are associated with defending or prosecuting the inter-governmental claims and with the labor-intensive job of acting as lawyer for each of the nearly 2800 claimants with claims under $250,000.[36] It is the Americans with claims larger than $250,000 who have paid by far the greatest share of the amounts deducted, but it is difficult to believe that they are responsible for any substantial part of the Government's costs. The Government failed to convince Judge Kozinski on this point. J.S. App. at 40. Little more was offered to Congress thereafter.

Moreover, the disparate deductions from the Tribunal awards of different claimants belie any relationship between these charges and the costs created by individual claimants' use of the Tribunal. For example, the exaction of over $1.2 million paid by Chevron constituted approximately one tenth of all "fees" deducted from Tribunal awards.[37] Given that each of Chevron's awards was the product of a private settlement, based on limited filings and without a hearing, and that the Tribunal has made

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[36] *Annual Report of the Iran-United States Claims Tribunal for the Period Ending 30 June 1987* at 24 (1987).

[37] Chevron's share is between one ninth and one thirteenth, based on total deductions of between 1 and 1.5 percent from the $1.073 billion in awards paid to U.S. claimants as of the end of September, 1988. Brief for Appellant at 21.

nearly 400 awards,[38] it is impossible to believe that Chevron was responsible for ten percent of the Tribunal's recoverable costs.

A fee may only be imposed for activities which are "a necessary part of the cost of providing a special benefit to the licensee." *Mississippi Power & Light Co.*, 601 F.2d 223, 231.

> [A] fee schedule should be reasonably related to the individual cost of services as well as to the total costs for the particular segments of recipients. . . . [T]he fact that the Commission may assess a *class* of recipients with a fee is no justification for imposing a tax upon *some* of the members of that class to produce the total cost of the service.

National Cable Television Association v. Federal Communications Commission, 554 F.2d 1094, 1108-09 (D.C. Cir. 1976).

State courts confronting a similar allocation problem with respect to deductions from probate awards have recognized that the size of an award has little relationship to the court resources consumed and have therefore generally found such deductions to be taxes rather than fees. For example, in *Treiber v. Knoll*, 135 Wis.2d 58, 398 N.W.2d 756 (1987), the court concluded that a "filing fee" of .1 percent of the value of all estates in excess of $10,000 "although designated a 'fee' in the statute, is in reality a tax upon the disposition of one's property upon death." 398 N.W.2d at 758. The court noted the lower court's assertion that the amount of work performed by a probate court did not vary in proportion to the size of the estate. *Id.* at 757. The court stated that where, as here, "the amount of an exaction is in no way dependent upon the amount of services provided by the judge or register in probate but depends entirely upon

[38] As of October 1, 1988, the Tribunal had rendered 390 awards. President's Report on the National Emergency With Respect to Iran, 24 Weekly Comp. Pres. Doc. 1502, 1503 (Nov. 15, 1988).

the valuation of the estate, then the exaction is a tax." *Id.* at 758.[39]

Here, too, the deduction was not correlated to the costs of services rendered to individual claimants. Successful claimants were forced to pay for costs attributable to unsuccessful claimants. Settling claimants paid at the same rate as litigating claimants. Those who did not use the Security Account did not pay at all. This included banks, who were allowed to file claims in the Tribunal but to negotiate settlements that were paid from a separate, deduction-free, escrow account. Most importantly, larger claims bore a burden that was in no way related to the costs of use of the Security Account for which the fee

[39] *Accord In re Estate of Zoller*, 53 Del. 448, 171 A.2d 375, 376 (1961) (determining that a "fee" of 1 percent of the net estate was a tax: "[A]n arbitrary standard of probate fees graded according to the value of the estate and manifestly intended for the purpose of raising revenue has been decided to be a tax, and the same has been held true as to a fee of a certain percentage of judgments obtained."); *Joslin v. Regan*, 63 A.D.2d 466, 406 N.Y.S.2d 938, 941 (N.Y. App. Div. 1978) ("The fee schedule is not one based upon a fixed percentage of the value of the estate. If it were, a fee imposed, however labeled, would be susceptible to characterization as a tax.")

In distinguishing between taxes and fees under federal law, Judge MacKinnon has relied on the "well reasoned opinion" in *State ex rel. Davidson v. Gorman*, 40 Minn. 232, 41 N.W. 948, 949 (1889), striking down a probate "fee" justified as reimbursement to the state for salaries paid to its probate judges:

> [Charges based on a percentage of the estate] are not in any sense fees or costs assessed impartially, or with regard to the expense occasioned or services performed. The amounts are regulated wholly, but arbitrarily, with regard to the value of the estate. They have no proximate relation to the amount of the compensation paid to the probate judge, nor to the other expenses of the court, nor to the nature or extent of the services which may become necessary in the proceedings. . . . It is thus apparent that these exactions are 'taxes' in the general and in the precise meaning of that word.

National Cable Television v. FCC, 554 F.2d at 1106 n.44, *quoting* 40 Minn. at 233-235, 41 N.W. at 949-950.

was charged. Thus, Chevron paid $1.2 million in "user fees" for its "use" of the Security Account when the costs to the U.S. of that Account for a year amounted to only $900,000 by the Government's own admission. Brief for Appellant at 10.

In short, Congress failed to provide for fees based on even "some fair approximation of use." *Massachusetts v. United States*, 435 U.S. 444, 463 (1978). As this Court observed in *Webb's Fabulous Pharmacies*, "the exaction is a forced contribution to general government revenues, and it is not reasonably related to the costs of using the courts." 449 U.S. at 163.

CONCLUSION

Under most circumstances the difference between a tax and a fee is unimportant. Congress' broad taxation powers mean that Congress can almost always raise revenues in any fashion it desires. This case, however, presents the unique situation in which the Government has admittedly not imposed a tax and has not met the requirements of the Origination Clause. In these circumstances, the Government's levy can avoid the strictures of the Takings Clause only if it is a user fee. This exaction does not meet the requirements for a user fee. A taking has therefore occurred, and the judgment of the Court of Appeals for the Federal Circuit should be affirmed.

Respectfully submitted,

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